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ABSTRACT

This volume is intended to help public administrators and attorneys deal with the legal problems in Pennsylvania public sector labor relations. In it, the Pennsylvania Labor Relations Board is discussed and public sector labor relations court decisions are cited. The volume is intended to be a reference book and to reveal inconsistencies in decisions concerning public sector bargaining. The first three sections discuss the fundamentals of the Pennsylvania Public Employee Relations Act, its applicability, and how elections are held. Section 4 covers bargaining units and special classes of employees, including school units, county and court units, hospital units, and others. The next three sections discuss bargaining and exclusions from bargaining. The concluding sections deal with unfair practices, strikes, hearings and procedure, judicial review, police and firefighters, arbitration, and injunctions. A lengthy appendix contains copies of Pennsylvania forms used in public employee labor relations, the text of the Pennsylvania Public Employee Relations Act, and the rules and regulations of the Pennsylvania Labor Relations Board. (Author/JM)

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PENNSYLVANIA PUBLIC EMPLOYE LABOR RELATIONS

BY John D. Thrush, Esq.

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First Edition – 1977

INTRODUCTION

This marks the initial publishing effort by the Pennsylvania School Board Solicitors Association (and the Pennsylvania School Boards Association) of a formal text that is addressed to the legal problems of a special area of public sector endeavor, in this case labor relations.

Pennsylvania Public Employe Labor Relations is intended for the practitioner — attorneys who represent public agencies, and public administrators who are charged with the administration of public agency endeavor on a day-to-day basis.

The publisher invites the reader's comments and suggestions regarding this publication. A special acknowledgement is in order for Vasil Fisanick, Esq., 1977 president of the Pennsylvania School Board Solicitors Association, the Executive Committee of PSBSA, and the association's general counsel, William Fearen, Esq., for their cooperation and encouragement in making this publication possible.

Requests for possible use of material contained in this publication should be directed to the publisher.

Fred M. Heddinger
Executive Director
Pennsylvania School
Boards Association

DEDICATION

This work is dedicated with deep affection to my wife, Donna, and my children, Amy, John and Todd.

PREFACE

In recent years, the law of labor relations has become more and more a part of public administration. Starting with the enactment of a bargaining act for police and firemen in 1968 (Act 111) and continuing with the enactment of the Public Employe Relations Act in 1970 (Act 195), public employers in Pennsylvania have been obliged to engage in meaningful collective bargaining.

School board solicitors, borough solicitors, township solicitors and county solicitors throughout the state were suddenly thrust into a field that was new and strange to them. Labor lawyers experienced in the private sector had to adjust to new legislation and new problems that were unique to representation of public sector clients. The Pennsylvania Labor Relations Board (PLRB) was thrown into the midst of controversy affecting agencies of government. It was also confronted with more work than was reasonable to expect of it. Complicating the problem was the absence of a comprehensive system of reporting and updating PLRB and court decisions.

After seven years, some of the initial problems have resolved themselves. The bar and bench are becoming more at home with public sector labor law and its effects. The PLRB has adjusted to its new responsibilities and there is available the *Pennsylvania Public Employe Reporter* in which key PLRB decision are contained. The Pennsylvania School Boards Association has several publications that deal with PLRB, arbitration and court decisions.

This book is intended to meet another need — to provide a text in which PLRB and court decisions are discussed and cited. Non-labor lawyers are provided with a reference book for guidance. Labor lawyers will be able to compare PLRB rulings with NLRB decisions with which they are most familiar. Finally, the PLRB and the courts will have the opportunity to see certain inconsistencies that have grown up in decisions interpreting the law applicable to public sector bargaining. Hopefully, my efforts in writing this book will add to consistency and logic in future decisions.

I express my gratitude to those who have helped me in preparing this book. First among those deserving thanks is my secretary, Gail Sible, whose every moment over the past year has been taken up in office work and in typing and retyping the draft of this book. Her patience and skill have been of immeasurable help to me.

During the summer of 1977 I served as legal consultant to the Governor's Study Commission on Public Employe Relations. The commission was provided with advance copies of this book to enable it to see the course of Pennsylvania public sector labor law decisions.

I, in turn, was able to hear the complaints about, and praise for, PERA and Act 111. I am indebted to the Governor's Commission for giving me the opportunity to serve and for the many suggestions and comments for improvement of this book. Specifically, I thank the Honorable Benjamin R. Jones, chairman, Gregory L. Coleman, John W. Ingram, Anne Jones, John D. Killian, Esq., Richard Kirschner, Esq., Thomas H. Lane, Esq., Nancy M. Neuman and Alex Satinsky, Esq.

Two others whose help in reviewing this book has been immeasurable are William J. Atkinson, Esq., executive director of the Governor's Study Commission, and Pamela McFarland, legal assistant to the commission. Their comments, suggestions and encouragement have been most sincerely appreciated.

John D. Thrush
Harrisburg, Pa.

ABBREVIATIONS USED IN THIS BOOK

__________ A.S.D. — ______________ Area School District

__________ A.2d __________ — Atlantic Reporter, Second Series, West Pub. Co.

__________ D. & C.2d __________ — Pennsylvania District and County Reports, Second

__________ L. Ed.2d __________ — U.S. Supreme Court Reports, Lawyers Edition, Second

NLMRA — National Labor-Management Relations Act, generally known as the Taft-Hartley Act, 29 USCA §__________ et seq.

NLRB — National Labor Relations Board

__________ Pa. Cmwlth. __________ — Pennsylvania Commonwealth Court Reports

__________ Pa. __________ — Pennsylvania Supreme Court Reports

PERA — Public Employe Relations Act, 43 P.S. §1101.101 et seq.

PLRB — Pennsylvania Labor Relations Board

PLRA — Pennsylvania Labor Relations Act, 43 P.S. §211.1 et seq.

__________ PPER __________ — Pennsylvania Public Employe Reporter

__________ P.S. § __________ — Purdon's Statutes §______________

__________ S. Ct.__________ — U.S. Supreme Court Reports (West Publ. Co.)

__________ S.D. — ______________ School District

__________ U.S. __________ — U.S. Supreme Court Reports (official reports)

__________ U.S.C.A. §__________ — United States Code Annotated §______________

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§1. Fundamentals

§1.1 The Right to Bargain

At the heart of PERA is Article IV that guarantees employes the right to form unions and to engage in concerted activities.

> "401 Employe rights
>
> It shall be lawful for public employes to organize, form, join or assist in employe organizations or to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice and such employes shall also have the right to refrain from any or all such activities, except as may be required pursuant to a maintenance of membership provision in a collective bargaining agreement."

This section is patterned after Section 7 of the NLMRA, 29 USCA §157.

The most important right guaranteed is the right "to bargain collectively through representatives of their own free choice." Although there was nothing to prohibit collective bargaining prior to PERA, there was nothing to compel it either, and given the choice, most public employers declined to bargain with representatives of public employes. Section

401 guaranteed the right to bargain.(*1*) Section 1201 (a) (5) made it an unfair labor practice for the public employer to refuse to bargain collectively with employe representatives. (*2*) The interaction of these two sections makes mandatory, in the public sector, the collective bargaining that we have become so familiar with in the past 40 years in private businesses.

§1.2 Collective Bargaining Representative

Before bargaining begins, it is necessary to decide just who, if anyone, will bargain for public employes. Section 401 gives employes the "right to refrain from any or all such (union) activities."(*3*) PERA is not a union law; it is directed at allowing public employes the free choice of collective bargaining or no collective bargaining. Elaborate procedures are established to determine if employes do indeed want a collective bargaining representative.

Under NLMRA, the fundamental rule is that an employer need not and may not recognize a union as a collective bargaining agent for his employes unless a majority of the employes in the unit want the union. Whether a majority want the union may be determined by an NLRB election, the most frequent practice, or by other appropriate means. One other means may consist of an impartial person examining "authorization cards" designating the union as representative and signed by a majority of the employes.

Other means of determining majority status also for PERA exist. Section 602 (a) states:

> "(a) A public employer may recognize employe representatives for collective bargaining purposes, provided the parties jointly request certification by the board which shall issue such certification if it finds the unit appropriate." (*4*)

One must assume that the PLRB will also make inquiry into the proposed employe representative's majority status. Deciding on an employe representative is not the right of the employer or the union, but logically is that of the employes. Although the quoted section seems broad enough to allow the

---

1. 43 P.S. §1101.401.
2. 43 P.S. §1101.1201 (a) (5).
3. 43 P.S. §1101.401.
4. 43 P.S. §1101.602 (a).

employer to agree with a union that it shall represent employes without employe sanction, such an interpretation is inconsistent with basic labor law and with the other provisions of Article VI.

Section 603 (b) provides for an election among public employes in an appropriate unit when the employer consents to the election. Section 603 (c) provides for an election among public employes in an appropriate unit when the employer will not consent to the election. In either case, there must be 1) a showing that 30% or more of the public employes in the appropriate unit desire representation by the demanding union, and 2) the PLRB must determine whether the suggested unit is or is not appropriate. *(5)*

Collective bargaining units existing on January 1, 1970, continued to exist by virtue of a grandfather's clause. *(6)*

§1.3 The Appropriate Unit

The key to success of winning or losing union elections is often in the composition of the unit. In private sector cases, many rules govern what is and is not an appropriate unit. Some of these are codified in PERA.(7) The phrase "community of interest" is much used in discussing whether the group of employes constitutes an appropriate unit. Separation of professional employes from nonprofessional employes, except by their consent, is another rule of long standing, carried over from NLRB proceedings. Rules, not written but obvious, require units to be limited in most cases to their employer. For example, the union will not be awarded a unit of "all highway workers of the borough of Gettysburg and Adams County." The employers are separate and units of employes must also be separate. *(8)*

One provision unique to PERA is the act's direction to consider the effects of "over-fragmentization." The warning is likely tied to a provision that notes that the commonwealth "will be bargaining on a statewide basis..." Size of the employer and the realities of fixing state wage policies are recognized by PERA. *(9)*

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5. 43 P.S. §1101.603 (b) (c).
6. Section 602, 43 P.S. §1101.602.
7. See Section 604, 43 P.S. §1101.604.
8. Indiana County Commissioners, 8 PPER 122
9. 43 P.S. §1101.604 (4).

Other unit questions involve such matters as inclusion or exclusion of individuals from particular units. First level supervisors may not be included in units of other employes, although they may form their own units of first level supervisors.*(10)* Management level employes, confidential employes, clergymen, etc., are excluded from the definition of public employe and thus may not be included in any unit of public employes. In close elections, where one or two votes may be critical, long hard fights are fought for inclusion or exclusion of one such employe from a unit.

§1.4 The Election and Exclusive Representation

When the bargaining unit composition is determined, a date is fixed and a secret ballot election is conducted by PLRB personnel. *(11)*

The collective bargaining representative selected in this balloting is the exclusive representative of all employes in the bargaining unit as to "wages, hours, terms and conditions of employment".*(12)* Employes who voted "no union" are bound to be represented as surely as the most outspoken union supporter. If two unions competed for votes and one attained a majority, the prevailing union speaks for all employes, including members of the losing union.

PLRB elections are won by the party receiving a majority of the votes cast, not by a majority of the voters in the unit.*(13)* For this reason and to assure a true expression of employe interest in union representation, all employes in the unit should be urged to vote.

§1.5 Scope of Bargaining

When a collective bargaining relationship is established for public employes, the public employer is not obliged to bargain about everything. The primary limitation upon what the union may demand in its bargaining is that it relate to the employment situation. The phrase used in PERA and NLMRA

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10. Section 604, 43 P.S. §1101.604.

11. 43 P.S. §1101.605.

12. 43 P.S. §1101.606.

13. Center Twp. Sewer Authority, 7 PPER 330.

to describe the scope of bargaining is "wages, hours and other terms and conditions of employment". (*14*)

Public sector bargaining is so different from private sector bargaining that despite common use of the phrase "wages, hours and other terms and conditions of employment", NLRB precedent should be carefully examined before it is accepted by the PLRB as proper in the public sector.(*15*) The Legislature was sufficiently concerned with the difference between public and private sector bargaining that it wrote special sections limiting the scope of bargaining when such bargaining could intrude upon "inherent managerial policy" or where bargaining could create contract terms in violation of or inconsistent with statute or government ordinance. (*16*)

§1.6 Strikes and Picketing

Public employe bargaining, like any bargaining, may eventually reach the point where agreement simply cannot be reached. At this point, unions have the choice of strike or capitulation. The old law prohibited strikes.(*17*) The new law allows strikes by the public employe but subject to certain limits:

1. "Strikes by **guards at prisons** or **mental hospitals**, or employes directly involved with and necessary to the functioning of the **courts** of this commonwealth are prohibited at any time."(*18*)

2. "Strikes creating 'a clear and present danger or threat to the health, safety or welfare of the public' are prohibited." (*19*)

3. "Strikes during prescribed mediation procedures are prohibited." (*20*)

Picketing in private sector cases is essentially the exercise of free speech, subject to certain limitations. Among the

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14. 43 P.S. §1101.701; 29 USCA §158 (d).

15. PLRB v. State College Area School District, 6 PPER 92, 461 Pa. 494, 337, A.2d 262 (1975).

16. 43 P.S. §1101.702 and §1101.703.

17. 43 P.S. §215.2.

18. 43 P.S. §1001.

19. 43 P.S. §1003.

20. 43 P.S. §1002.

limitations on picketing are preventing violence, obstructing entrance ways to buildings, mass picketing, etc.*(21)* The concept of many of these rules should carry over from the private sector into the public sector. PERA has one section on picketing designed to avoid a common problem. The purpose of picketing is to disrupt the employer's activities by interfering with deliveries and other services by union represented employes. Where the employer has two unions at his place of business and one pickets the building, the other union members will frequently refuse to cross the picket line. Section 1101 (43 P.S. §1101.1101) makes refusal to cross a picket line other than the employes' own in a nonprohibited strike, the equivalent of an unlawful strike.

§1.7 Unfair Practices

Mere grant of the right of collective bargaining is a frail benefit to employes unless the right is protected. Section 1201 (43 P.S. §1101.1201) states what shall be unfair labor practices and Article XIII, 43 P.S. §1301, et seq. authorizes the PLRB to prevent these practices according to the rules set forth therein. Section 1201 (a) describes public employer unfair practices, while Section 1201 (b) spells out unfair practices by employe organizations.*(22)*

It is stated above that a mere statutory right to bargain will avail one little if there are no rules to protect that right. Section 1201 (a) (1) prohibits "interfering, restraining or coercing employes in the exercise of the(ir) rights" to collective bargaining. Secion 1201 (a) (3), 43 P.S. §1101.1201 (a) (3) also protects employes from discriminatory discharge. If it were not for these provisions, the employer could simply fire anyone who expressed an interest in bringing in a union to bargain. Section 1201 (a) (5) *(23)* makes "refusing to bargain collectively in good faith with an employe representative" an unfair practice. This is obviously a most direct aid to collective bargaining.

PERA avoids the mistake of the National Labor Relations Act of 1935 (the Wagner Act), the early federal legislation establishing the NLRB. That act omitted any reference to unfair practices by employe organization. The National Labor

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21. 43 P.S. §206 (i).

22. 43 P.S. §1101.1201.

23. 43 P.S. §1101.1201 (a) (5).

Management Relations Act of 1947 (*24*) (the Taft-Hartley Act) added provisions to set bounds on the conduct of unions. PERA, as noted, has both employer and union unfair practices. (*25*)

§1.8 Police and Firemen

Not all public employes are subject to the provisions of PERA. Prior to the passage of PERA, the General Assembly enacted Act 111 that required public employers to bargain with police and firemen employed by them. Act 111 recognizes the essential nature of the services provided by police and firemen and does not allow them to strike under any conditions. In place of the right to strike, there is a relatively elaborate system of bargaining established that provides that if the public employers and the union cannot reach agreement, then the issues between them will be submitted to a panel of three arbitrators for resolution. A majority of the three arbitrators agree upon a settlement and the public employer must accept the contract so written by the arbitrators.

The arbitrators' decision is free from challenge except for fundamental faults. However, the arbitrators cannot agree upon contract provisions that are contrary to statutes regulating benefits allowed to police or firemen. The Pennsylvania Supreme Court explained this rule by saying that the arbitrators could not award that which the public employer was prohibited from giving voluntarily.

Act 111 does not contain election procedures or make provision for unfair labor practices. This lack created problems for public employers and for unions who had no simple means of determining appropriate bargaining units or proper inclusion or exclusion from bargaining units. Further, there was no means, except court action, to compel a reluctant public employer to bargain. In a recent case, the Pennsylvania Supreme Court held that the enactment of Act 111 had subjected police and firemen to the Pennsylvania Labor Relations Act, a 1937 law that is similar to PERA and is otherwise applicable to private sector labor relations. (*26*) Although this Supreme Court decision is helpful, Act 111 is still a rather troublesome enactment that seems a prime

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24. 29 U.S.C.A. §151 et seq.
25. 43 P.S. §1101.1201 (b).
26. 43 P.S. §211.1, et seq.

candidate for legislative change.

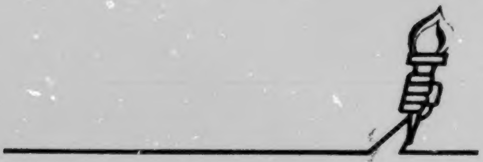
§1.9 Arbitration

After the collective bargaining agreement is written, harmony and peace rarely follow. There are inevitable disputes as to contract terms or the propriety or severity of discipline of employes. These disputes could be resolved by going to court to have contract terms interpreted or they might be resolved by the union striking or bringing other pressure to bear to force its interpretation of the contract upon the employer.

Long ago, unions learned that the courts took too long to render decisions. Further, court action was expensive. Similarly, even if public employes were allowed to strike to compel their ideas of contract interpretation upon an employer, a strike is often more harmful to employes than to the employer, and unions do not always win strikes. A better way to settle disputes of contract administration is to take these problems before an impartial third party, an arbitrator, and have him hear the facts and render a decision binding on both parties. This is the most frequent solution in private sector labor relations. PERA goes a step farther and requires arbitration of all contract interpretation disputes.

§1.10 Other Provisions

The foregoing is a brief summary and overview of PERA. The basics presented in these few pages are to provide a framework for the rest of the book where other PERA provisions, NLRB practices and labor relations concepts are discussed in detail.



§2. Applicability

PERA is not applicable to all employers in Pennsylvania. It is a "public" employe relations act and unless one is a "public employer" and a "public employe" as those terms are defined in PERA, one is not subject to the other provisions of PERA. Specifically, a "public employer" is not one subject to the Pennsylvania Labor Relations Act (*1*) or the National Labor Management Relations Act.(*2*) One is not a "public employe" if one is in an excluded class like "elected officials, appointees of the governor..., management level employees,...", etc.(*3*) Further, certain legislation is preserved for special classes of workers: Act 111 applicable to police and firemen,(*4*) legislation relative to transportation authorities(*5*) and a Philadelphia bargaining ordinance.(*6*) Further, there may be a question as to what is an "employe organization" as defined in PERA.(*7*) Following is a discussion of several of

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1. 43 P.S. §211.1, et seq.
2. 29 U.S.C.A. §151, et seq.
3. 43 P.S. §1101.301 (2).
4. 43 P.S. §1101.301 (2) and §1101.2002.
5. 43 P.S. §1101.2001.
6. 43 P.S. §1101.2003.
7. 43 P.S. §1101.301 (3).

the key problems where applicability of PERA has been challenged.

§2.1 The Public Employer

PERA is applicable only to "public employers". Public employers are defined in PERA as follows:

> (1) "Public employer" means the commonwealth of Pennsylvania, its political subdivisions including school districts and any officer, board, commission, agency, authority, or other instrumentality thereof and any nonprofit organization or institution and any charitable, religious, scientific, literary, recreational, health, educational or welfare institution receiving grants or appropriations from local, state or federal governments but shall not include employers covered or presently subject to coverage under the act of June 1, 1937 (P.L. 1168), as amended, known as the "Pennsylvania Labor Relations Act," the act of July 5, 1935, Public Law 198, 74th Congress, as amended, known as the "National Labor Relations Act."(*8*)

One lead case involved *Beth Jacobs Schools,* (*9*) a nonprofit corporation engaged in secular and religious education of Jewish children. The PLRB sought to assert jurisdiction over this institution by virtue of the fact that it was a "nonprofit corporation" as enumerated in PERA and it received money under a school lunch program and also for books. The Commonwealth Court concluded that this institution was not subject to PERA. The court stated that to be a public employer, the "nonprofit organization or institution" need receive grants or appropriations from local, state or federal governments. As to money which the school received for lunch programs, the court said that this was nothing but a reimbursement program for money paid out to buy lunches for children. The grant was not to the school but rather to the children. As to a sum of $300 used to purchase library books, the court regarded this as "de minimis" and so trifling that it would not regard it as sufficient to impose PERA upon the school.

Brownsville General Hospital v. PLRB, 5 PPER 61, 15 Pa.

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8. 43 P.S. §1101.301 (1).

9. 3 PPER 78, 8 Pa. Cmwlth. 343, 301 A.2d 715 (1973).

Cmwlth. 428, 325, A.2d 662 (1974) dealt with a nonprofit hospital. The Commonwealth Court rejected the contention of the PLRB that all nonprofit corporations were subject to PERA without regard to their receiving grants or appropriations. Commonwealth Court viewed the phrase "receiving grants or appropriations from local, state or federal governments" as applying to all of the nongovernment organizations listed in the definition. If further concluded, that money received by the hospital under federal Medicare and Pennsylvania Medical Assistance Program was by way of reimbursement and was not an "appropriation or grant". The PLRB had also argued that a $1,800,000 federal construction grant to the hospital in 1965 was sufficient to make applicable the "grant or appropriation" provision. The court rejected this and indicated that the grants must be current grants. The court also regarded receipt of $1,000 from Fayette County as a reimbursement sum or in the alternative as a trifling sum not sufficient to give the PLRB jurisdiction over the hospital. This decision has been appealed to the Supreme Court. The PLRB had previously ruled and continues to rule that employers that are "nonprofit corporations" need not receive grants or appropriations to be subject to its jurisdiction. (*10*)

Other cases have resolved the issue of just who the employer is. These cases take many forms. In *South Fulton School District*, 1 PPER 7, a driver education instructor was shared with two other school districts. The PLRB regarded him as being an employe of the district in which he spent most of his time. Municipal authorities, rather than the borough which they serve, are employers of their own employes. (*11*) The Board of Directors of a community action agency and not the county commissioners was considered the employer in *Scranton - Lackawanna Human Development Agency*, 2 PPER 174. The *Pennsylvania Turnpike Commission*, 2 PPER 204 although an independent agency, was still regarded as the commonwealth in the employment relationship.

In the section dealing with appropriate bargaining units for counties, the question of employer of county row office workers and court employes is discussed. The counties seem

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10. American Red Cross, 3 PPER 31; Merion Golf Club, 3 PPER 388; Student Services, Inc., 6 PPER 118. See Overbrook School for the Blind, 6 PPER 128, for a discussion of appropriations to a school which the PLRB regards as subjecting it to PLRB jurisdiction.

11. Borough of Ambridge Municipal Authority, 5 PPER 18.

to present another problem when one considers who is the employer at the county prison. In three different cases, three different entities are designated as the public employer. In one, it is the county commissioner, in another, it is the county prison board, and in the third, the county itself is designated as the employer. (*12*)

It can happen also, that the employes whom the union seeks to organize are not those of the public employer. When a subcontractor is present at the facility of the public employer, that subcontractor is the employer.(*13*) Although the contractor may be a public employer, the subcontractor may well be a private business firm subject to NLMRA, not PERA.

§2.2 The Public Employe

Public employe is defined by PERA as follows:

> (2) "Public employe" or "employe" means any individual employed by a public employer but shall not include elected officials, appointees of the governor with the advice and consent of the Senate as required by law, management level employes, confidential employes, clergymen or other persons in a religious profession, employes or personnel at church offices or facilities when utilized primarily for religious purposes and those employes covered under the act of June 24, 1968 (Act No. 111), entitled "An act specifically authorizing collective bargaining between policemen and firemen and their public employers; providing for arbitration in order to settle disputes, and requiring compliance with collective bargaining agreements and findings of arbitrators." (*14*)

Persons who do not fall in the definition of public employe may not organize and are not entitled to protections available to a public employe. Elsewhere in this book are discussed such categories as "Management Level Employes", "Confidential Employes" and "Policemen and Firemen".

There have not been that many cases dealing with other categories of persons removed from the definition of public

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12. **Luzerne County Prison**, 1 PPER 112; **Lycoming County Prison Board**, 6 PPER 114; **Bradford County**, 3 PPER 267.

13. **Lankenau Hospital**, 3 PPER 24.

14. 43 P.S. §1101.301 (2).

employe. Appointees of the governor with advice and consent of the Senate are rather easily identified persons. In one case, there was an effort to claim that an appointed borough secretary and an appointed street commissioner were "appointees". The PLRB regarded them as employes. (*15*) The phrase "clergyman or other persons in a religious profession, employes or personnel at church offices or facilities when utilized primarily for religious purposes" was considered in the *Beth Jacobs Schools*, 2 PPER 111. The Court of Common Pleas of Philadelphia County stated:

> "We note further that a 'public employe' specifically excludes clergymen or other persons in a religious profession or employes or personnel at church offices or facilities when used primarily for religious purposes. See 43 P.S. §1101.301 (2). We hold that the system of education employed by the plaintiff is primarily for religious purposes and secondarily for secular purposes, and even the secular is subject to limitations prescribed by the Jewish Orthodox faith."

A category of nonemployes not mentioned as excluded, is that of students. Specifically, interns and residents at several Pennsylvania health institutions sought to organize for purposes of collective bargaining. Initially, the PLRB treated these residents and interns as students and not employes. (*16*) The PLRB reversed itself and held interns and residents to be public employes.(*17*) This decision was in turn reversed by the Commonwealth Court.(*18*) The Supreme Court agreed with the Commonwealth Court's conclusion that interns and residents were indeed students.(*19*) The Pennsylvania Supreme Court's decision was based in part on a like finding by the NLRB in *Cedars-Sinai Medical Center*, 223 NLRB 57 (1976). Research has shown only one other case where the PLRB considered student status versus employe status. In the *Girard College* case, 6 PPER 225, junior house masters were regarded as public employes although they were students.

An amusing note is introduced into the consideration of who is and who is not an employe in three recent cases. A

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15. Trafford Borough, 6 PPER 72.

16. Albert Einstein Medical Center, 1 PPER 123.

17. Albert Einstein Medical Center, 2 PPER 56.

18. 5 PPER 93, 15 Pa. Cmwlth. 532, 328 A.2d 539 (1974).

19. 7 PPER 239, ____ Pa. ____, 369 A.2d 711 (1977).

group of enterprising prisoners in the Delaware County Prison filed a petition to be represented by the United Prisoners' Union. Related to this filing, two unfair labor practice charges were filed against the prison by prisoners who charged that their organizational rights had been violated. All three charges were dismissed by the PLRB that declined to hold prisoners to be employes within the meaning of PERA. (*20*)

§2.3 Employe Organizations

PERA contains a definition for employe organization as follows:

> (3) "Employe organization" means an organization of any kind, or any agency or employe representation committee or plan in which membership includes public employes, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, employe-employer disputes, wages, rates of pay, hours of employment, or conditions of work but shall not include any organization which practices discrimination in membership because of race, color, creed, national origin or political affiliation. (*21*)

The PLRB has determined that no great formality need be attached to the nature of the employe organization. It can be individuals merely banded together to represent their common interests, without constitution or bylaws. (*22*)

The fact that an employe organization presently has no public employes in its membership does not disqualify it from representing public employes. (*23*) The Pennsylvania Nurses Association was not disqualified as an employe representative of licensed practical nurses merely because it did not admit such persons to membership. (*24*) Neither was Pennsylvania Nurses Association less an employe organization because it admitted supervisors and management employes to membership. (*25*)

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20. Delaware County Prison Board, 8 PPER 52; Delaware County Board of Prison Inspectors, 8 PPER 53 and Teamsters Local 77, 8 PPER 54.

21. 43 P.S. 1101.301 (3).

22. Shenandoah Area School District, 2 PPER 211; Court of Common Pleas of Columbia and Montour Counties, 7 PPER 36.

23. Montgomery Community College, 2 PPER 135.

24. Albert Einstein Medical Center vs. PLRB, 4 PPER 59, ____ Pa. Cmwlth. ____, 374 A.2d 761 (1977).

25. Medical College of Pennsylvania vs. PNA, 4 PPER 83.

The PLRB is not at all anxious to disqualify employe organizations on the basis of technicalities. In one case, it said that it was unnecessary to establish that the entity was indeed an employe organization.(*26*) This is probably because it seemed apparent that it was dealing with a legitimate employe organization.(*27*)

Closely related to the question of who is the employe organization representing employes, is the problem of subsequent affiliation of an employe organization with a different employe organization. The first case to deal with this was *Jersey Shore Area School District*, 4 PPER 145. The PLRB issued an amended certification, the procedure followed in all of the other cases. It noted that it was not necessary to go through the full procedure necessary to the original certification of a union and that this was a mere affiliation. There had been no dissolution of the original certified employe organization. In *Blair County Prison*, 5 PPER 12, the certified bargaining unit was actually dissolved and a new employe organization designated. The PLRB refused this certification in that this was not a continuation of bargaining agents but a replacement of an original one with a new one. The PLRB also ruled that a new election was inappropriate because of the contract bar rule. The principles stated in the *Blair County* case, were repeated in *School District of Pittsburgh*, 5 PPER 68, the PLRB summarized them as follows:

> Thus the board will look closely to the procedure followed in the vote and the structure of the newly affiliated union. If the board finds that (1) the newly affiliated local is a continuation of the old with the same officers and functional leaders and; (2) steps have been taken to insure that a majority of the membership approves and that there is no loss of identity of the certified local and; (3) there is no change in the day-to-day relationship with the employer and; (4) it is made clear that all contract commitments with the employer will be honored, the board will permit an affiliation.

The rules of *Blair County* and *School District of Pittsburgh* were followed in several subsequent cases.(*28*) The last cited

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26. Northern Lehigh School District, 3 PPER 322.

27. See also Thomas Jefferson University, 3 PPER 347.

28. Cheltenham Township, 5 PPER 80; Rose Tree-Media School District, 5 PPER 87; Central Bucks School District, 6 PPER 23; Lincoln Intermediate Unit No. 12, 7 PPER 137.

case makes specific reference to the PLRB procedures on certification set forth in 34 Pa. Code §95.23 (b) (7) where affiliation is specifically mentioned. It is clear, that affiliation is an internal matter for the employe organization and that so long as there is a continuation of the bargaining agent as described in the *Pittsburgh School District* case, the PLRB will not meddle in the union's affairs. The mere fact that nonmembers of the union are not permitted to vote will not upset such a change in affiliation. (29)

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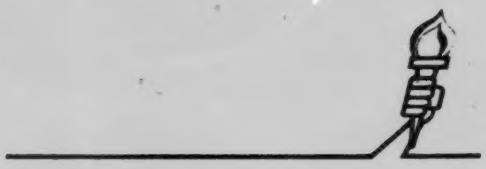
29. School District of Pittsburgh, 5 PPER 68.



§3. Elections

§3.1 Selection of Employe Representative

PERA provides two means to determine the employe representative — voluntary recognition and elections.(*1*) A grandfather provision allowing continued recognition of previously existing employe representatives is no longer of importance. (*2*)

The PLRB has provided a form for use by employe organizations is requesting recognition of the public employer.(*3*) Although this is mentioned in the PLRB rules, it is likely not the exclusive means of demanding recognition of the public employer.(*4*)

There have been several requests to merge existing bargaining units, all represented by one union, into one overall unit. The PLRB has consistently rejected such requests for a variety of reasons such as differences in crafts and resulting lack of community of interest, history of separate bargaining, lack of interchange of employes between units and

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1. 43 P.S. §1101.602 (a) and §1101.603.
2. 43 P.S. §1101.602 (b).
3. See Appendix, Form No. 1.
4. 34 Pa. Code §95.12.

propriety of original unit determinations.(5) However, the best reason for refusing to conduct elections to merge units is that there is no provision in the law giving such authority to the PLRB. The PLRB does suggest that there is no prohibition on the employer and the union accomplishing **de facto** merger by engaging in joint bargaining. (6)

§3.2 Voluntary Recognition

PERA provides for voluntary recognition as follows:

> "a. A public employer may recognize employe representatives for collective bargaining purposes, provided the parties jointly request certification by the board which shall issue such certification if it finds the unit appropriate."(7)

Note that it is still necessary for the PLRB to find the proposed unit to be appropriate for purposes of collective bargaining.

The PLRB may make this finding on the basis of the "Joint Request for Certification" filed by the parties.(8) This form contains questions that allow the PLRB to reach a rough conclusion as to the appropriateness of the proposed unit. (9)

One should also remember that the voluntary recognition allowed by this section does not permit the employer to designate an unwanted union. Although the issue has not arisen, it is beyond question that PERA contemplates a union supported by a majority of the employes in an appropriate unit. An employer who would voluntarily recognize a union would be foolish to do so without some showing of majority employe support for that union. Recognition of a minority union is a blatant interference with the rights of the majority of the employes to be free of union representation or to be represented by a union of their own choosing. It is also unlawful support and domination of the union so established. Similarly, the minority union so established does itself interfere with employes' freedom to choose or not to choose their own representative.

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5. Pittsburgh Housing Auth., 5 PPER 15; Marion Center A.S.D., 5 PPER 42.

6. Commonwealth of Pennsylvania, 5 PPER 39.

7. 43 P.S. §1101.602 (a).

8. See Appendix, Form No. 2.

9. See 34 Pa. Code §95.11 for regulations governing joint requests for certification.

Employes who feel that a voluntarily recognized representative does not actually represent a majority of the employes would be well advised to file an unfair labor practice charge alleging 1) employer interference with employe rights and 2) employer domination and/or interference with the formation of the employe organization.*(10)* Following the same reasoning, such employes might also file a charge alleging employe organization restraint of rights guaranteed by Article IV of the PERA. *(11)*

§3.3 Joint Request

An employer served with a "Notification and Request for Election" may decline a "Joint Request for Certification" but may instead join in a "Joint Election Request".*(12)* In such case, there is generally no dispute as to the make up of the bargaining unit. The rules applicable to such requests are set forth in 34 Pa. Code, §95.13. One requirement is that five day's advance notice be given of the filing of the request. The purpose of these notices is to give employes and other unions an opportunity to participate in the proceeding. There is also provision for intervention by other interested unions. Intervention is discussed under a separate heading.

§3.4 Petitions for Representation

Where the public employer refuses to consent to the request for a consent election within 10 days after the request, the union may file a Petition for Representation, etc.*(13)* The regulations applicable to this petition are stated in 34 Pa. Code §95.14.

In filing of a petition to represent employes, the employer may 1) agree to the union's proposed bargaining unit or 2) decline to consent and submit the issue to the PLRB for hearing on the appropriateness of the unit, etc.

The public employer can file a petition for an election only in the rare instance where the union demands recognition by notice that 30% or more of its employes want to be represented by the union, and then neglects to file a petition before the PLRB. This seems a "bluff calling" provision, but

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10. 43 P.S. §1101.1201 (a), (1) and (2).

11. 43 P.S. §1101.1201 (b) (1).

12. Apendix, Forms No. 1, No. 2 and No. 3.

13. See Appendix, Form No. 4.

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may be helpful to an employer who would challenge the union at times of its choosing rather than at the union's time.

§3.5 Showing of Interest

Section 603 of PERA spells out the election procedure for representatives of public employes. The first step in a union securing an election is acquisition of a showing that 30% or more of the employes in an appropriate unit want to be represented by the union. Failure to present a showing of interest justifies the PLRB's dismissal of the petition seeking recognition.(*14*) The purpose in this 30% showing is to guarantee that some reasonable number of employes are interested in the petitioning union before the PLRB and the employer go to the trouble of determining an appropriate bargaining unit and conducting an election.

The 30% "showing of interest" need not be in any particular form. It may be by petition or authorization cards as described in Section 603 of PERA, 43 P.S. §1101.603, and in 34 Pa. Code §95.17 which states:

> "Section 95.17. Validity of Showing of Interst.
>
> The showing of interest submitted shall not be furnished to any of the parties. The board or its agents shall determine the adequacy of the showing of interest and such decision shall not be subject to collateral attack in any hearing."

Most frequently, the showing of interest is by authorization cards prepared by the petitioning union and clearly designating that union as an employe's choice as his collective bargaining agent.

The mechanics of demonstrating a showing of interest are as follows. The PLRB will not expect a showing of interest where a joint petition for recognition is submitted. If the employer does not consent to recognition, the PLRB will ordinarily request a showing of interest at the representation hearing. If an extremely large unit is involved and if it will take a disproportionate amount of time to review authorization cards at a hearing, the PLRB will request them at board offices at sometime in advance of the hearing.

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14. Pa. State Capitol Police, 6 PPER 338.

The broad general rule is that the employer has no right to see or to question the validity of the authorization cards. (*15*)

As justification for its refusal to consider defects in the cards, the PLRB has said that the election is the critical factor and if there is any mistake in securing cards, it will be corrected in an election. It also says that examination of authorization cards may intimidate employes in that they would be afraid to sign authorization cards if they knew that the employer might see them. (*16*)

This conclusion and the regulations set forth in 34 Pa. Code §95.17 are open to objection. The requirement of a 30% showing of interest is a statutory requirement and one would reasonably assume that its compliance may be tested in the courts. If the PLRB does not care to reveal the identity of signers of cards, procedures can be worked out whereby they are protected. Needless to say, there can be faults in the cards that negate a 30% showing of interest. Employes can withdraw or seek to withdraw authority given the union to bargain for them or to seek an election. The board has refused to consider such withdrawals.(*17*) Authorization cards can be obtained by misrepresenting their purpose. The board has refused to consider such charges.(*18*) Cards may be obtained by supervisors. Although the board seems to recognize a fault in this procedure, it indicated that it would not consider the cards void. (*19*)

If two unions are competing for one bargaining unit, it can happen that an employe signed for one union but then signs for another union. In such cases, the later card would seem to supercede the earlier card. The PLRB did not agree with this conclusion.(*20*) Cards can be so old that there is a

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15. **Montgomery County Community College**, 2 PPER 135; **Luzerne County**, 3 PPER 203, **Borough of Emmaus**, 3 PPER 206; **Hospital of University of Pennsylvania**, 3 PPER 243; **City of Lebanon**, 3 PPER 285; **County of Berks**, 4 PPER 8; **Bucks County Common Pleas Court**, 6 PPER 325; **Suburban General Hospital**, 2 PPER 181; **University of Pennsylvania Hospital**, 1 PPER 102.

16. **Reading Community General Hospital**, 2 PPER 7; **Metropolitan Hospital**, 2 PPER 72; **Suburban General Hospital**, 2 PPER 181.

17. **Suburban General Hospital**, 2 PPER 181.

18. **York County**, 5 PPER 2; **Williamsport Area Community College**, 3 PPER 296.

19. **City of Philadelphia**, 6 PPER 345.

20. **Montgomery County Community College**, 2 PPER 135; **Dauphin Co. Commissioners**, 8 PPER 31.

doubt as to whether employes still want the union to represent them. In *Montgomery County Community College*, 2 PPER 135, the PLRB said that the matter of currency was a determination to be made by the board and that the employer could not raise the objection. In *Metropolitan Hospital*, 2 PPER 72, cards more than a year old were accepted as a proper showing of interest. However, in *Wyoming Area S.D.*, 3 PPER 275, authorization cards older than 10 months were not allowed to substantiate a showing of interest.

Some question has arisen as to how to treat authorization cards submitted after the original petition is filed. In *Eastern Lebanon County S.D.*, 3 PPER 343, the board allowed new cards to be submitted at the representation hearing. In *Borough of Plum*, 7 PPER 40, a representation petition filed on the last day was permitted for filing. Authorization cards were submitted after this time and the board accepted them. In another case, the representation petition was originally supported by showing of interest cards. At a later date, one of two unions involved in the election refused to reestablish its showing of interest. The PLRB said that it would not demand a subsequent submission of authorization cards. (*21*)

§3.6 Contract Bar and Certification Bar

PERA allows certain times during which representation petitions cannot be filed. The requirements are set forth in Section 605 (7) as follows:

> "(7) (i) No election shall be conducted pursuant to this section in any appropriate bargaining unit within which in the preceding 12-month period an election shall have been held nor during the term of any lawful collective bargaining agreement between a public employer and an employe representative. This restriction shall not apply to that period of time covered by any collective bargaining agreement which exceeds three years. For the purposes of this section, extensions of agreements shall not affect the expiration date of the original agreement.
>
> (ii) Petitions for elections may be filed with the board not sooner than 90 days nor later than 60 days before the expiration date of any collective bargaining agreement or after the expiration date until such time as

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21. Delaware County, 6 PPER 264.

a new written agreement has been entered into. For the purposes of this section, extensions of agreements shall not affect the expiration date of the original agreement." (*22*)

The first portion of this section deals with what is referred to as the "certification year". The purpose for this section is to allow the employe organization to negotiate a contract with the employer without having to contend with organizational efforts by rival unions. This section was considered in *Lebanon S.D.*, 6 PPER 25. The PLRB followed the NLRB rule and said that the 12-month period runs from the date of the election. It also noted that although a petition was filed within 30 days before the expiration of the 12-month certification year, it would not dismiss the petition but would rather follow the NLRB rule of allowing the petition to stand but conducting the election after the 12-month period had actually run.

The contract bar rule is intended for a different purpose. The purpose of the rule is to protect both the public employer and the employe organization from disruption of orderly labor relations. Thus, during the life of the contract, another employe organization cannot petition to represent the employes except during the 30-day period that is between 90 days and 60 days before the expiration of the contract. Petitions filed during that 30-day period will be allowed. (*23*) Petitions filed outside the prescribed 30-day period will be dismissed. (*24*)

Several cases have considered what agreements qualify to constitute a contract bar. A mere salary schedule for employes even though negotiated by a union, does not constitute a contract that will bar an election petition. (*25*)

A contract that was not signed by both parties, but which had been agreed to and ratified by the union, was not regarded as enough to bar a representation petition.(*26*) A contract containing a guarantee of benefits of PERA was interpreted to be a waiver of the contract bar rule. (*27*)

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22. 43 P.S. §1101.605 (7).

23. Pittsburgh S.D., 3 PPER 5.

24. City of Philadelphia, 3 PPER 355, Commonwealth of Pennsylvania, 8 PPER 50.

25. City of Philadelphia, 6 PPER 345; City of Reading, 3 PPER 323.

26. Steel Valley Area Technical Joint Board, 7 PPER 231.

27. Borough of Wellsboro, 1 PPER 140.

On the contrary, a contract executed before certain employes had actually been hired by the public employer did constitute a contract bar to a petition by a union seeking to represent them.(*28*) A collective bargaining agreement for a unit including supervisors still barred a representation petition. The board suggested that a petition for a unit of first-level supervisors might be appropriate but that the contract bar rule still stood. It even declined to allow the petitioner to seek clarification of the unit to exclude supervisors in that only the bargaining representative could so petition.(*29*) In *Rose Tree-Media S.D.*, 5 PPER 87, the board held that affiliation of the employe organization with another labor organization was not prohibited by the contract bar rule. A contrary result was reached where the old organization was dissolved in favor of a new bargaining agent. (*30*)

It should be noted that if bargaining does not bring forward a contract before the expiration of the old contract, the statute allows representation petitions to be filed then. However, the statute also provides that extensions of existing agreements do not bring the contract bar rule into play. (*31*)

§3.7 Intervention

When one union seeks to represent employes in an appropriate bargaining unit, it is not unusual to find that other unions will seek to represent these same employes. The procedure to be followed by the second union is intervention. Intervention is provided for in 34 Pa. Code §95.44. That section states that motions to intervene need be in writing and state the grounds therefore. It also provides that in representation proceedings, public employer or public employes may participate without formal intervention on showing of good cause.

The showing of interest for an intervener is provided for in 34 Pa. Code §95.14 (j). In order to be put on the ballot, a labor organization need have only a 1% showing of interest in the unit, but to intervene as a party, a 10% showing of interest is necessary. (*32*)

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28. City of Bethlehem, 2 PPER 179.

29. Temple University, 5 PPER 77.

30. Blair County Prison, 5 PPER 12. See §2.3, Employe Organization.

31. Borough of Norristown, 7 PPER 172.

32. See Pittsburgh S.D., 3 PPER 5; Parkland Area S.D., 5 PPER 47.

Intervention has been allowed in cases where it was clearly appropriate for the employe organization to be heard from, although the niceties of the rules were not followed. In *Tyrone Area S.D.*, 1 PPER 45, a representation petition filed after the hearing on another representation petition, was treated as a motion to intervene and the intervening union was placed on the ballot. In *Phoenixville Area S.D.*, 4 PPER 128, intervention was allowed at the hearing.(*33*) *Pottsgrove S.D.*, 1 PPER 48 and 1 PPER 90, involved a situation where a joint request for certification was directed to the board. Such a request does not contemplate an election. A second employe organization intervened and the board held that an election was appropriate since a question of representation had been raised by the intervening party.

In three cases, the intervening union sought a smaller bargaining unit than the initial union. In two of these cases, the PLRB ruled that this was proper and allowed the intervention.(*34*) A somewhat different situation was presented in *Bucks County Court of Common Pleas*, 6 PPER 325, where one union sought an overall bargaining unit of professional and nonprofessional employes and a second union petitioned for a unit of just professional employes. The board regarded the petition for the professional employes as an intervention. It declined to split the professional and nonprofessional groups of employes and put the intervener on the ballot with the initial union for the professional and nonprofessional voting.

In *York County Prison Board*, 6 PPER 174, a petition was filed by one union and a second union intervened. When the initial union withdrew, the intervener was allowed to continue with the election as the party in interest.

In several cases, the PLRB has declined intervention. In one case, the PLRB refused to recognize a union as being independent and not dominated by the employer.(*35*) In two cases, the PLRB refused intervention when the motion to intervene was filed long after the hearing in the cases and long after the intervener knew of the existence of the representation petition.(*36*) In another case, a new election

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33. See also Northhampton County Area Community College, 3 PPER 53.

34. Metropolitan Hospital, 2 PPER 72; Upper St. Clair S.D., 3 PPER 236.

35. Montgomery County Community College, 2 PPER 135.

36. Temple University, 3 PPER 99; Allegheny County, 3 PPER 149.

had been ordered by the Commonwealth Court. The PLRB did not regard it as appropriate to permit a new party to intervene at this stage of the proceedings.(*37*)

§3.8 Challenges to Elections

PERA provides in Section 605 (6) that the board shall certify the results of an election if no person files a charge "alleging that an 'unfair practice' existed in connection with said election." It goes on to say:

> "...If the board determines that the outcome of the election was affected by the 'unfair practice' charge or for any other 'unfair practice' it may deem existed, it shall require corrective action and order a new election. If the board determines that no unfair practice existed or if it existed, did not affect the outcome of the election, it shall immediately certify the election results." (*38*)

It would thus appear, that the touchstone for upsetting an election is 1) the presence of an unfair labor practice and 2) the fact that the unfair practice "affected" the election. Any unfair labor practice would seem to be available for upsetting the election. However, the PLRB has broad authority to control elections by virtue of 43 P.S. §1101.1201 (a) (7) and §1101.1201 (b) (4) which provide that it is an unfair labor practice for either the public employer or the employe organization to take part in "violating any of the rules and regulations established by the board regulating the conduct of representation elections". Various election rules are set forth in 34 Pa. Code Sec. 95.51-95.57.

The Commonweath Court has added another interesting dimension to interpretation of the word "affected". In *Western Psychiatric Institute v. PLRB,* 6 PPER 26, 16 Pa. Cmwlth. 204, 330 A.2d 257 (1974), the Commonwealth Court stated as follows:

> "The union cites Section 605 (6), *as amended,* 43 P.S. §1101.605 (6), providing that the Board shall certify election results in the presence of an unfair practice if it finds that the offending conduct did not affect the outcome of the election in support of the contention that, even if the union did engage in unfair practices, there

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37. Western Psychiatric Institute, 6 PPER 157.

38. 43 P.S. §1101.605 (6)

> was no showing that its conduct affected the outcome of the election. Our reading of Section 605 (6) compels the conclusion **that if, as here, an unfair practice is proved, the guilty party thereupon has the burden to prove that its conduct had no effect on the outcome of the election, not that the innocent party must prove not only the offense but also that the outcome of the election was thereby affected.** The unfair practice was amply proved in this case and the union not only failed to deny or explain its actions but offered nothing to prove that its forbidden electioneering did not affect the result, as it obviously was intended to do." Emphasis added.

The PLRB held in some of its earlier cases that evidence must be presented to show that the complained of conduct did "affect" the outcome of the election and that in the absence of such evidence, the election could not be upset.(*39*) It is extremely difficult to present evidence that any particular acts actually affect the outcome of an election. In *McKeesport Hospital*, 3 PPER 21, the PLRB seemed to recognize this and stated as follows:

> "In evaluating an alleged interference resulting from the conduct of an election the Board will not attempt to assess its actual effect on the employes, how they felt or whether they were confused, but will rather concern itself with whether it is reasonable to conclude that the conduct or procedures employed tended to prevent the free formation and expression of the employes' choice. In making this evaluation, the Board will treat each case on its facts." (*40*)

With this brief introduction, various conduct will be examined which has been held to be grounds for upsetting elections or which the PLRB has rejected as a reason for holding new elections.

§3.8.1 Contamination of the Polling Place

Events at the polling place sometimes contaminate the election. PLRB has held that there is nothing improper in a person who will vote in the election sitting as a watcher for the

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39. Magee Women's Hosp., 1 PPER 88, 2 PPER 1; Somerset County, 2 PPER 60, 65; and National Union of Hospital and Nursing Home Employes, 2 PPER 71.

40. See also Oil City Hospital, 5 PPER 1, C.P., Venango County.

employer.(*41*) Although 34 Pa. Code §95.53 provides that no electioneering shall take place in the polling area, several cases have held that electioneering may continue in places away from the polling area. (*42*)

Generally, the brief presence of supervisors in or near the polling place is not a basis for upsetting the election, although supervisors **should** stay away from this area.(*43*) Similarly, the brief presence of a union representative in the polling area was not a basis for upsetting the election.(*44*) In two cases, the mere presence of supervisors or management personnel in the polling place was enough to upset the election.(*45*)

Finally, initial denial of access to the polling area for purposes of inspection to a union representative did not require a new election. (*46*)

§3.8.2 Conduct of the Election

Other matters involving PLRB conduct of the election have been raised and rejected as a basis for holding a new election. In one case, it was argued that it was necessary to give personal notice to each voter of the fact of the election. PLRB held this unnecessary.(*47*) In another case, a public employer complained that the following statement on the ballot encouraged a vote for the union:

> "--election to ascertain the exclusive representative for the purposes of collective bargaining in respect to wages, hours, and terms and conditions of employment for all employes of--" (*48*)

The PLRB held this language was proper.

Two cases have involved an early closing of the polls. PLRB found that no one had been deprived of his opportunity

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41. Edgewood S.D., 5 PPER 72.

42. United Steel Workers, 3 PPER 22; Oil City Hospital 3 PPER 262.

43. Pittston Hospital, 1 PPER 89; York Day Nursery and Kindergarten, 3 PPER 87.

44. International Union of Operating Engineers, 3 PPER 87. See also Springfield, Delaware Co. S.D., 4 PPER 66.

45. McKeesport Area S.D., 3 PPER 48; Police, Firemen and Medical Association, 3 PPER 81.

46. York Day Nursery and Kindergarten, 3 PPER 288.

47. Allegheny County, 3 PPER 149.

48. Metropolitan Hospital, 3 PPER 125.

to vote and that, in the absence of such a finding, there was no necessity to direct a new election.(*49*) These cases are questionable in that one must always wonder if another voter, perhaps a voter not on the eligibility list, might not have come to the polls expecting to find them open but finding them closed, was deprived of a vote. It is careless and improper for the PLRB to assure voters that the polls will be open at certain times and then permit them to close early. The board likes to talk about maintaining "laboratory conditions" in the conduct of its elections. It seems rash to close the laboratory just because the board agent thinks the experiment has been completed and wants to go home. Like objections should be voiced about late opening of the polls, which did not trouble the PLRB in *Harrisburg S.D.*, 1 PPER 107.

§3.8.3 Outside Influences

Since only the public employer or the employe organization, their agents or representatives, or public employes are enumerated as being prohibited from "unfair practices", it would seem logical to conclude that conduct of persons who were outside those terms and who could not commit unfair labor practices could not affect the outcome of the election. In two cases, absence of proof of agents of the union or the employer resulted in a finding that elections could not be upset. (*50*)

However, elections may certainly be upset although neither the employer nor the union has committed any unfair labor practice. The PLRB can conduct an election in such a faulty manner that it feels itself required to conduct a new election. One such instance involved the PLRB's loss of challenged ballots which might have affected the outcome of the election.The PLRB ordered a new election to correct its own mistake.(*51*) In *Oil City Hospital,* 3 PPER 262, the PLRB agent conducting the election allowed a photographer to take pictures of voters at the voting place. The PLRB considered this proper, but the Court of Common Pleas of Venango County overruled this decision and directed a new election. (*52*)

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49. **Allentown School District**, 3 PPER 54 affirmed, C.P., Lehigh County, 3 PPER 214; **York Day Nursery and Kindergarten**, 3 PPER 288.

50. **Oil City Hospital**, 3 PPER 262, affirmed by C.P., Venango County, 5 PPER 1; **Center County**, 6 PPER 197.

51. **Phoenixville Area S.D.**, 5 PPER 50.

52. 5 PPER 1.

§3.8.4 Captive Audience Speeches

The PLRB has borrowed another concept from NLRB practice in prohibiting captive audience speeches. The captive audience speech or the 24-hour speech is a compulsory assembling of groups of employes on company time within 24 hours prior to the election. The NLRB condemns this in the lead case of *Livingston Shirt Corp.*, 107 NLRB 400. The PLRB cases have not found violations of this rule and have commented on the fact that meetings were voluntary, that there were no misrepresentations that were likely to affect the outcome of the election. (*53*)

The purpose of the captive audience speech is, of course, to "get the last crack at employes" before the election. It seems likely that refinements of the federal rule will appear in future PLRB cases.

§3.8.5 Meetings and Other Contacts with Employes

Several cases hold that there is nothing improper in meeting with employes to explain the employer's point of view so long as the meetings are not coercive and so long as the employes are not misled by these meetings or telephone calls. (*54*)

§3.8.6 Wage and Benefit Increases Shortly Before an Election

It is not unusual to find employers increasing wages or granting new benefits shortly before a union election. This may happen because the employer wants to "bribe" his employes with new benefits or it may happen that the union has timed its appearance on the scene to coincide with customary increases so that it can say that it has frightened the employer into making these increases. Whatever the reason, an increase in wages or an improvement in benefits will cause public employes to think much more kindly of their employer in the voting booth. To avoid this "bribe", the PLRB and the NLRB will void elections that have been contaminated by them. (*55*)

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53. Conemaugh Valley Memorial Hosp., 2 PPER 115; McKeesport Hosp., 3 PPER 21; Unionville-Chadds Ford S.D., 3 PPER 178 and Monongahela Valley Hosp., 3 PPER 374; Williamsport Area Community College, 8 PPER 143.

54. Barnes-Kasson County Hosp., 4 PPER 48; Lebanon County, 5 PPER 55; Court of Common Pleas of Crawford County, 6 PPER 217.

55. See Williamsport Area Community College, 8 PPER 143.

However, where there is a logical explanation for making the increases when they were made, there is no impropriety. Most frequently, one finds that the increases were made at the customary time of the year for making them and the employer's conduct is justified by past practice. (*56*)

Increases were made in Blue Cross benefits at the usual times and there was no impropriety in *Conemaugh Valley Memorial Hospital*, 2 PPER 115. However, when insurance refund checks were mailed to employes two days before the election, timing was entirely too fortuitous. This seemed especially so in that the checks had been prepared three weeks before the election.

§3.8.7 Misleading Statements Near the Time of the Election

One of the better statements concerning misleading statements and campaign trickery is cited from the NLRB case *Hollywood Ceramics Company, Inc.*, 140 NLRB 221, 224 (1962). The following quotation appeared in *Upper Merion Area S.D.*, 3 PPER 386:

> "We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, **so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. However, the mere fact that a message is inartistically or vaguely worded and subject to different interpretations will not suffice to establish such misrepresentation as would lead us to set the election aside.** Such ambiguities, like extravagant promises, derogatory statements about the other party, and minor distortions of some facts, frequently occur in communication between persons. But even where a misrepresentation is shown to have been substantial the board may still refuse to set aside the election if it finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election. (Emphasis added)." (*57*)

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56. Unionville-Chadds Ford S.D., 3 PPER 178; Court of Common Pleas of Crawford County, 6 PPER 217.

57. However, see Shopping Kart Food Market, Inc., ____ NLRB ____ (1977).

The PLRB has been very generous in viewing campaign propaganda and has not upset an election in at least six cases. *(58)*

However, employer's misrepresentations about fines imposed by unions caused the board to order a new election in *Unionville-Chadds Ford S.D.*, 3 PPER 178.

§3.8.8 Miscellaneous Grounds for Objections to an Election

Following are some other reasons asserted to upset PLRB elections.

In *Conemaugh Valley Memorial Hospital*, 2 PPER 115, it was held improper for the hospital to prohibit the wearing of pro-union buttons on uniforms while pro-hospital buttons were tolerated. In that same case, it was found that the hospital's failure to post a PLRB notice of election containing a sample ballot was a further basis for upsetting the election and conducting a new one. In *Lebanon County*, 5 PPER 55, the PLRB notice was posted in a very poor place; however, eight days prior to the election, it was moved to a prominent location, affording employes ample notice of the election.

In *Archdiocese of Philadelphia*, 2 PPER 211, letters were sent to lay teachers by prominent members of the ministry. The PLRB found that devout lay teachers would be intimidated by these letters. Another basis for upsetting the election was the excessive number of challenges to voters. The PLRB concluded that about 200 out of 363 of the challenges were totally without merit and accomplished nothing but disruption of the election process. A new election was directed.

Both the NLRB and the PLRB are very protective of their ballots. Sample ballots are shown on notices of election and if ballots are marked, it is frequently a basis for upsetting the election. The logic behind it is that if "X" is put in the union box or in the company box, the employes will be misled and think that that is how they must mark their ballots. However sound the logic of this, the PLRB has said:

> "We find that the reproduction...of altered copies of the board's official ballot tended to interfere with a free choice in the election and was improper." *(59)*

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58. Conemaugh Valley Memorial Hospital, 2 PPER 115; Whitemarsh Township, 2 PPER 49; Allentown S.D., 3 PPER 54, affirmed, C.P., Lehigh County, 3 PPER 214; Lebanon County, 5 PPER 55; Monongahela Valley Hospital, 3 PPER 374.

59. Service Employes International Union, 3 PPER 36.

If one is convinced that a marked ballot will persuade persons to vote for either the employer or an employe organization, what one should do is to avoid making the ballot look like an official ballot. Then ballot marking can be done with impunity. (*60*)

§3.9 Eligibility Lists

At the present time, 34 Pa. Code §95.16 requires an employer to supply the board with a list of names and addresses of employes in the appropriate unit, which list may be made available by the board to any party to the proceeding who requests it. This is the so-called **Excelsior** list. It derives its name from *Excelsior Underwear, Inc.*, 156 NLRB 1236. In NLRB practice, the list of names and addresses of employes is also supplied to the union before the election so as to provide the union with a full opportunity to communicate its ideas to those employes. One is presently obliged to follow the rule.

However, the PLRB attempted to secure compliance with this rule without bothering to promulgate it. The courts were not too taken with the necessity of complying with a rule that the PLRB thought up on the spur of the moment and declined to order new elections when employers refused to give the PLRB names and addresses. (*61*)

§3.10 Eligible Voters

It is not a simple task to determine who will be eligible to vote in a PLRB election. Obviously, the first step is for the PLRB to determine what is an appropriate unit for voting. When that first step is taken, it necessitates a second step to exclude persons such as supervisors, confidential employes, management level employes and other persons, who, by statute or difference in occupation, are not properly within the PLRB determined unit.

Before the election, the employer is expected to provide to the PLRB a list of all eligible employes. (*62*) The employer

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60. Eye and Ear Hospital of Pittsburgh, 5 PPER 48.

61. Jeanette District Memorial Hospital, 3 PPER 110, Common Pleas, Westmoreland County, affirmed by the Commonwealth Court, 4 PPER 18, 11 Pa. Cmwlth. 415, 315 A.2d 917 (1974).

62. 34 Pa. Code §95.16.

can do this in all good faith and nevertheless omit certain names. It may also happen that there are new hires or that employes have terminated employment or that there are employes on leave of absence. A question arises, should these employes be allowed to vote? What should be done with their ballots when they come to vote? If they are mixed with the other ballots, and if the persons are found ineligible to vote, how can their ballots be removed from the voting box? The PLRB has generally followed NLRB practices and rules in answering these questions. Following is a discussion of the cases decided on these subjects by the PLRB.

§3.10.1 Eligibility Cut-Off Date

In preparing an eligibility list for an election, there must be a cut-off date. The PLRB rules do not state what this cut-off date will be, but in *York County*, 3 PPER 121, the following rule can be derived: The eligibility list is normally to be taken from the payroll before 1) the PLRB representation hearing, if one is conducted or 2) the date of filing of a joint election request or 3) such other date as the parties may agree to.

In a subsequent case the PLRB stated its intention to follow the ruling of the Pennsylvania Supreme Court in *PLRB vs. Rooney*, 389 Pa. 587, 113 A.2d 533 (1957) and to use the payroll date prior to 1) the date of the filing of the petition, 2) a different agreed date, or 3) the payroll date prior to the PLRB representation hearing or prior to the PLRB's order of election. *(63)*

§3.10.2 Agreed Eligibility List

In two cases, the PLRB has made reference to a rule that in the federal sector is known as the Norris-Thermador rule. It derives from an NLRB case set forth in 119 NLRB 1301 (1958). The gist of the rule is that if the public employer agrees that the eligibility list is complete and accurate, then he cannot challenge the names that are on this list. If the employer has agreed to the list, the PLRB has said "It is difficult if not impossible to see any prejudice to (the employer) concerning these voters."*(64)* The Court of Common Pleas of Delaware County agreed with the PLRB decision on this point.*(65)*

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63. Pottsgrove S.D., 8 PPER 66.

64. Taylor Hosp., 5 PPER 33.

65. 7 PPER 10. See also Norwin S.D., 6 PPER 174.

§3.11 Challenges to Voters

At the voting, the eligibility list is used as a check list. Persons who do not appear on it are ordinarily challenged by the board agent, if not, by one of the parties. When a person is challenged, his vote is not mixed with the other votes. It is put in an envelope and the envelope is marked with his name and the reason for the challenge. Then, if it becomes necessary to count this person's vote, it can be done.

Challenged ballots are not counted unless they are determinative of the election. By way of example, if 25 persons vote, and there are 15 votes for the union, and 8 votes for the public employer, 2 challenged ballots would not be counted because at best they would give the employer only 10 votes, which are not enough to overcome the 15 votes cast for the union. However, if there were 12 votes for the public employer and 12 votes for the union, and 1 challenged ballot, that challenged ballot could well determine the election. The validity of the challenge would be determined and the ballot counted or destroyed. *(66)*

It should be noted, that if, by mistake, ballots are not put in separate envelopes but are mingled with other ballots, they cannot be challenged after the election. *(67)*

§3.11.1 Specific Examples of Challenges

New Hires

The general rule is that persons hired after the date of the eligibility list will not be permitted to vote. *(68)*

The *Franklin County* case is a trifle different from the others in that employes hired prior to the issuance of the order of election were allowed to vote and an employe hired thereafter was not allowed to vote.

Wattsburg Area S.D., 6 PPER 339 is an effort in expediency. The eligibility cut-off date was June 27. On September 3, there were three new hires. The eligibility list was sent to the PLRB on September 10 and on September 12

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66. Lebanon S.D., 4 PPER 21; Greene County Memorial Home, 3 PPER 124.

67. West Shore S.D., 3 PPER 38.

68. Franklin County, 3 PPER 50; Allentown S.D., 3 PPER 54; York County, 3 PPER 121; Lebanon S.D., 4 PPER 21; Doctors' Osteopathic Hosp., 3 PPER 329.

the employer supplied the names of two of the employes hired on September 3. At the election, the third person hired on September 3 tried to vote and the PLRB concluded that in that it had permitted the other two persons to vote without challenge, it served no purpose to prohibit this person from voting.

Leaves of Absence

Persons on leaves of absence have been permitted to vote in original and in run-off elections.*(69)*

Terminated Employes

An employe who had given notice that she was going to quit, was challenged and her vote was not counted as she had no interest in what was going to happen at her place of employment after she left.*(70)* Similarly, an employe who resigned before the eligibility list was prepared and who was thereafter rehired was challenged and was not permitted to vote. *(71)*

However, two employes who were discharged for their union activity and who were ordered to be rehired had their challenged votes counted in the voting.*(72)* Employes whom the employer thinks might terminate or whom it might transfer to another unit, are nevertheless eligible to vote in that the possibility of their leaving the unit is rather speculative.*(73)* Three employes who were laid off for more than one year, where held ineligible to vote.*(74)*

§3.12 Interpretation of Ballots

Ballots are sometimes difficult to understand. Ordinarily, all that is required to mark a ballot is to put an "X" in the box for no union or an "X" in the box for the participating union. Some employes will write words on the ballot or sign their name or express their feelings about the union or the employer in rather colorful language. One must decide how

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69. Allentown S.D., 3 PPER 54, affirmed in Common Pleas, Lehigh County, 3 PPER 214; Phoenixville Area S.D., 5 PPER 50

70. Lower Dauphin S.D., 5 PPER 29.

71. Lysockview County Home, 5 PPER 100.

72. Reading Model Cities, 3 PPER 111.

73. Wallingford-Swarthmore S.D., 2 PPER 167.

74. United Cerebral Palsy of Schuylkill, Carbon and Northumberland Counties, 8 PPER 137.

these ballots are to be counted. If they are so confusing that one cannot clearly understand what is desired, the ballots should not be counted at all. On the other hand, if there is a clear indication of intention, the ballots should be counted.

In two cases, individuals wrote the word "no" in the "no union" box. It was simple to interpret this as votes against the union and the ballots were counted. (*75*)

In *Pennsgrove S.D.*, 6 PPER 334, 8 PPER 66, the PLRB reversed itself and said that it will not look at yes's or no's marked in voting boxes and try to guess what the voters meant. It says that voters must follow instructions and that it will void ballots where they do not do so.

When ballots are void, the question arises concerning who has a majority of the votes cast. In *Albert Einstein Medical Center vs. PLRB*, 7 PPER 8; ____ Pa. Cmwlth. ____, 374 A.2d, 761 (1971), 193 votes were cast for the Pennsylvania Nurses Association and 192 votes were cast for no representative. There was one void ballot. The PLRB and the Commonwealth Court said that the void ballot should not be considered as a vote cast, but should be completely disregarded with the result that the Pennsylvania Nurses Association was designated as the employe representative.

§3.13 Decertifications

It is not unusual for employes to become disenchanted with a union representation and to seek 1) another union or 2) to completely relieve themselves of union representation and return to nonunion status. PERA makes provision for this as follows:

> "§1101.607 Petition for decertification. If there is a duly certified representative: (i) a public employe or a group of public employes may file a petition for decertification provided it is supported by a 30% showing of interest, or (ii) a public employer alleging a good faith doubt of the majority status of said representative may file a petition in accordance with the rules and regulations established by the board, subject to the provisions of clause (7) of section 605." (*76*)

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75. Metropolitan Hospital, 2 PPER 72; West Shore S.D., 3 PPER 38.

76. 43 P.S. §1101.607. See also 34 Pa. Code §95.21.

Notice that the decertification petition may be filed by either the public employes or the public employer. If another union seeks to replace the existing employe representative, its chances of success are rather good. It is experienced at producing the 30% showing of interest, it knows the procedures before the PLRB and it knows how to persuade employes to favor its contention. Decertification petitions by groups of employes who want to be rid of their union find the going much more difficult. They may seek legal counsel, but unless counsel is experienced, he will have difficulty in advising them in the step-by-step procedure to secure decertification. Groups of employes dissatisfied by their union generally do not have the resourses to follow through the various steps necessary to decertify their existing employe representative. That employe representative does have resources and ordinarily will resist a decertification effort. Complicating matters is the fact that the public employer is ill-advised to assist a dissident group of employes seeking to decertify their representative. In the federal sector, supplying attorneys, encouraging and otherwise assisting a decertification effort has been held to be an unfair labor practice.

Other rules and procedures applicable to decertification elections are not greatly different from those applicable to election of an employe representative. There can be representation election.(77) Rules applicable to withdrawal of names on authorization card also apply.(78)

The unit to be decertified should coincide with existing collective bargaining unit. In *Philadelphia School District*, 3 PPER 11, the PLRB adopted federal precedent and declined to carve smaller units from larger units. If:

> "First, a decertification proceeding that will obviously result in the creation of an inappropriate unit must be dismissed.
>
> "Second, where a segment of a larger unit has demonstrably experienced: 1) a successful history of collective bargaining under the existing pattern of representation; 2) a solid record of participation in the collective bargaining process; 3) a high degree of integration in employment operation; and 4) there

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77. Springfield, Delaware County School District, 4 PPER 66.

78. Williamsport Area Community College, 3 PPER 296.

appears to be a probability of resultant disruptive effect on employment relationship if the unit is servered, then carving out of such a unit is inappropriate and a decertification petition seeking that result should be dismissed." (*79*)

Since the unit to be decertified must coincide with the previously certified unit, the 30% showing of interest must be determined by seeing how many persons are in the certified unit. (*80*)

The PLRB has allowed a petition for decertification filed by employes, even though it was filed within 12 months after the election. This is not consistent with federal practice and a different rule applies if an employer files a petition within one year after the election. However, the PLRB had no rule prohibiting such a filing within 12 months after an election and none was contained in the statute. (*81*) The PLRB announced its intention to promulgate rules correcting this oversite, and accomplished this in 34 Pa. Code §95.21.

The public employer may likewise file a decertification petion. It must allege a good faith doubt as to the majority status of the representative. It may not refuse to bargain on the basis of a good faith doubt as to majority status. The public employer is obliged to bargain for one year and then if it has a good faith doubt as to majority status, file its petition. (*82*)

The public employer has certain other problems before it can file its decertification petition. It is not resolved as to what is a "good faith doubt of majority status". In the federal sector, the employer would have to have an indication from 50% or more of his employes that they did not want the union to represent them. The public employer would have to comply with Section 605 (7) of PERA with the effect that its petition could not be filed within 12 months after an election in the collective bargaining unit and within the requirements of the "contract bar rule". Further, the employer may not ask

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79. See, also, **Commonwealth of Pennsylvania**, 2 PPER 101; **Commonwealth of Pennsylvania**, 4 PPER 101; **Commonwealth of Pennsylvania**, 7 PPER 89.

80. **Temple University**, 4 PPER 119.

81. **Twin Valley School District**, 7 PPER 86.

82. 43 P.S. §1101.65 (7) (i) and §1101.607 (ii). **Houtzdale Muncipal Authority**, 6 PPER 283.

people if they favor the union in that this might constitute unlawful interrogation, and it is likely prohibited from lending any assistance to dissident groups that would come forward and announce their opposition to their union.(*83*)

What can and what cannot be done when an employer finds dissatisfaction among his employes is best ascertained by a long conference with an experienced labor lawyer.

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83. See 34 Pa. Code §95.22 for rules applicable to an employer's petition for decertification.

§4. Bargaining Units and Special Classes of Employes

§4.1 Units

§4.1.1 Introduction

One issue to be resolved at PLRB hearings held prior to the election is the size and composition of the bargaining unit. By way of illustration: In a school district, all professional employes are generally grouped in one unit. The largest number of professionals would be teachers; however, nurses, psychologists and guidance counselors would likely be put in the bargaining unit with them as all share common interests — their level of education, common supervision, similar working conditions, duties, hours, benefits, etc. The PLRB might assign nonprofessional school employes to bargaining units consisting of bus drivers, to a unit of cafeteria and custodial workers, and a unit of secretarial and clerical employes.

The significance of the bargaining unit is that a contract will be negotiated for just that group of employes. It may be similar to other contracts, but when the PLRB rules that bus drivers shall have their own collective bargaining unit, then they are a distinct group with a separate and distinct collective bargaining representative and their own contract.

The nature of the bargaining unit is often important. A union might have great support among bus drivers, but very little support among clerks, custodians and food service employes. Obviously, the union would argue for a collective bargaining unit consisting of just bus drivers, which unit it would expect to win in an election. The employer, on the other hand, would seek a larger unit of perhaps bus drivers, custodians and food service workers, since it could expect the union to lose the vote in this enlarged group.

§4.1.2 Guiding Principles

It is a simple matter to state several guiding principles in making unit determinations. It is another matter to predict what collective bargaining unit the PLRB will decide to be appropriate and how it will apply the following rules to decide a unit question. Section 604 (1) provides that the PLRB, in making unit determinations, shall:

> "(1) Take into consideration but shall not be limited to the following:
>
> (i) public employes must have an identifiable community of interest and
>
> (ii) the effects of over-fragmentation." (*1*)

Both of these ideas have their origin in NLRB practice, although neither is found in statute. Also, there is much less avowed concern about "over-fragmentation" in federal cases than in Pennsylvania cases. The lead case discussing "community of interest" in the federal sector is *Kalamazoo Paper Box Corp.*, 136 NLRB 134. Several items discussed in NLRB and PLRB cases as showing "community of interest" tending to bind employes into bargaining units are:

1. Degree of functional integration of the employer's operation.
2. Common supervision.
3. The similarity of employes skills and functions.
4. Contact and interchangeablity of employes.
5. Common work situs.
6. General working conditions.
7. Similarity in fringe benefits.

If one looks at the above list and speculates as to

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1. 43 P.S. §1101.604.

community of interest between school bus drivers and school cafeteria workers, he is driven to the conclusion that there is not a great deal in common. However, if one is to avoid overfragmentation of the workforce, bus drivers should likely be joined in one unit with food service workers, custodians and probably teacher aides. "Community of interest" is often incompatible with efforts to avoid over-fragmentation. Neither the PLRB nor the courts have established a definite rule to guide one in determining how. Community of interest should be balanced against over-fragmentation.

A further problem in finding predictability in PLRB unit decisions is the oft repeated statement "the PLRB need find only **an** appropriate unit and is not bound to find the **most** appropriate unit."(*2*) This rule gives the PLRB more latitude in creating the wide variety of collective bargaining units described hereafter.

The problem with the seemingly unbridled discretion of the PLRB in deciding units is that it can write bargaining units to please those whom it would favor on the whim of the moment. The NLMRA contains a prohibition on units based on extent of organization.(*3*) The reason for this is to prevent the NLRB from deciding bargaining units to be appropriate just because a group of unrelated employes want to belong to a union. The PLRB has given lip service to this rule — that extent of organization will not be a factor in determining an appropriate unit -- but practice makes one wonder if the PLRB follows its pronouncements. (*4*)

§4.1.3. Court Review of PLRB Determinations

Though one may be troubled by PLRB determinations of "appropriate bargaining units", the courts have shown no great inclination to alter PLRB unit determinations. This derives from several factors: 1) findings of the PLRB "if supported by substantial and legally credible evidence shall...be conclusive."(*5*) 2) "...the board, as other such

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2. See **Univ. of Pennsylvania Hospital**, 1 PPER 102; **West Shore S.D.**, 6 PPER 200; **Dauphin Co. Commissioners**, 6 PPER 307; **Court of Common Pleas of Dauphin County**, 6 PPER 308; **Lehigh Co. Commissioners**, 7 PPER 151.

3. 29 U.S.C.A. §9 (c) (5).

4. **Dauphin Co. Commissioners**, 6 PPER 319; **University of Pittsburgh**, 3 PPER 212; **Metropolitan Hospital**, 2 PPER 72. See **W. Middlesex S.D.**, 6 PPER 221 for an apparent contradiction of the rule against bargaining units based on extent of organization.

5. 43 P.S. §1101.1502.

administrative agencies, is considered to be experienced and to possess expertise in the subject committed to its administration and therefore to be better qualified than this or other courts of law to weigh the facts and to appreciate the complexities of the subject of labor relations, including the appropriateness of a proposed bargaining unit."(*6*). 3) Unit determinations are very difficult to confine to fixed rules. As each employer differs, so "appropriate bargaining units" may differ. Someone must balance "community of interest" against "over-fragmentation" and take into account the other factors considered by the labor boards in reaching their conclusions. Unless the PLRB's "conclusions were capricious, arbitrary or unreasonable" the courts are less able and less willing to overturn unit determinations than PLRB determinations in unfair labor practice cases. (*7*)

Following is a review of PLRB unit determinations grouped according to the particular public employer. This analysis seems most logical in view of the rather confused state of predictability regarding bargaining units.

§4.2 School Units

§4.2.1 Introduction

Collective bargaining units deemed appropriate by the board for school districts are, in one respect, uniform and, in another respect, very confusing and inconsistent. The largest and most influential bargaining unit in the schools is that of teachers. With little dispute, professional units of teachers and related professionals have been established. Other units in schools include the nonprofessional employes. These units vary from "wall-to-wall" units to fragmentized units of bus drivers, school crossing guards and other groupings of insignificant importance. No real guidelines are laid out to permit one to understand why the PLRB has splintered the nonprofessional employes as it has; but there is a fragmentation and there does not appear to be a very good way of anticipating it.

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6. **Western Psychiatric Institute v. PLRB**, 6 PPER 26, 16 Pa. Cmwlth. 204, 212; 330 A.2d 257 (1974).

7. **Western Psychiatric Institute v. PLRB**, **supra. See also Albert Einstein Medical Center v. PLRB**, 6 PPER 8, 17 Pa. Cmwlth. 91, 330 A.2d 264 (1975); **Allegheny General Hospital v. PLRB**, 5 PPER 21, 14 Pa. Cmwlth. 381, 322 A.2d 793 (1974); **Albert Einstein Medical Center v. PLRB**, ____ Pa. Cmwlth. ____, 374 A.2d 761 (1977).

§4.2.2 Professional Employes

As noted, the most frequent and the most uniform collective bargaining unit in schools is one consisting of professional employes such as teachers, guidance counselors, librarians and nurses.(*8*) The only issues that seem to arise concerning these professional units bear on the inclusion of individual professionals in it. An audiometrician was, for example, included in a unit with teachers, librarians, nurses, social workers and psychologists in *Greater Johnstown Area School District*, 1 PPER 19. Teachers and psychologists were included in a collective bargaining unit in *City of Erie School District*, 1 PPER 5. Therapists and assessor-tutors were included in the professional unit in *Lafayette School District*, 2 PPER 107.

Occasionally, other units of professional employes are established separate from that of the teachers. Psychologists and social workers were put into a separate bargaining unit.(*9*) In one case, nonprofessional teacher aides were put into a collective bargaining unit with teachers.(*10*)

§4.2.3 Broad Nonprofessional Units

If over-fragmentation is to be avoided in the schools, it would be logical to do it by creating a "wall-to-wall" unit of all nonprofessional employes. In many cases this has been done. Secretarial employes, maintenance employes, food service employes and bus drivers have all been grouped in one unit.(*11*) In several cases where less than "wall-to-wall" bargaining units were requested, the PLRB said that this would result in over-fragmentation and it dismissed the petitions.(*12*) However, there have also been cases where generally broad units of nonprofessional employes have had specific groups severed from them. Bus drivers and cafeteria workers were severed from a unit of secretarial and

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8. **Loyalsock Township School District**, 1 PPER 3.

9. **Central Susquehanna Intermediate Unit #16**, 7 PPER 180.

10. **Capital Area Intermediate Unit #15**, 3 PPER 358.

11. **Springfield-Delaware County School District**, 2 PPER 56; **Northern Tioga School District**, 3 PPER 107; **Corey Area School District**, 3 PPER 346; **Harrisburg School District**, 1 PPER 107; **School District of Pittsburgh**, 3 PPER 257 (C.P., Allegheny County); **Cumberland Valley School District**, 3 PPER 348; **South Lehigh School District**, 5 PPER 11; **Pen Argyle Area School District**, 5 PPER 17; **Mid-Valley S.D.**, 8 PPER 133.

12. **Williamsport Area School District**, 7 PPER 68; **Central Susquehanna Intermediate Unit #16**, 7 PPER 313.

maintenance workers.(*13*) Custodians were excluded from a unit of bus drivers, cafeteria workers, crossing guards and teachers aides.(*14*) in *Lebanon School District*, 6 PPER 25, a nonprofessional unit was established by excluded secretarial employes, aides and monitors. A unit of cafeteria workers, teachers aides, library aides, monitors, reading aids and special education matrons was approved in *Punxsutawney A.S.D.*, 8 PPER 25.

A reading of the cases shows that the PLRB unit determination was influenced by the nine-month work year for employes whose employment coincided with the teaching year. Such employes were said to lack community of interest with employes working 12 months. However, in other cases, the nine-month employes were joined with 12-month employes, without explanation for the different treatment.

§4.2.4 Bus Drivers

The PLRB has held that bus drivers have a community of interest justifying their grouping into separate units. It notes that they are drivers, they are required to control the children, that they have no duties during the school day itself, but that they rather work only in the morning and in the evening, that they work only nine months a year, that they frequently have their own supervisor and have very little interchange with other nonprofessional employes in the school district. Examples of such separate units for bus drivers are as follows: *Marion Center Area School District*, 1 PPER 105; *Abington School District*, 1 PPER 118; *Northern Lehigh School District*, 3 PPER 322; *State College Area School District*, 7 PPER 223. Bus drivers were specifically excluded from a broad nonprofessional unit.(*15*) However, the PLRB declined to remove bus drivers from an existing unit of nonprofessional employes in another case.(*16*) In another case, the PLRB excluded service employes who would now and then operate buses. It viewed their primary interest as being with their custodial or food service jobs.(*17*) In another interesting case, the PLRB established a unit of part-time bus drivers and did

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13. West Middlesex School District, 6 PPER 221.

14. North East School District, 1 PPER 128.

15. West Middlesex School District, 6 PPER 221.

16. Chichester School District, 7 PPER 71.

17. Wallingford-Swarthmore School District, 2 PPER 167.

not accrete these drivers to an existing full-time unit of bus drivers. (*18*)

§4.2.5 Food Service and Custodial Employes

Research has not revealed any cases in which food service employes were grouped in a separate unit by themselves. However, it is not unusual for cafeteria workers, cooks, and custodians to be grouped in one collective bargaining unit. (*19*)

§4.2.6 Custodial Employes

In a recent case, the PLRB ruled that custodial and maintenance employes may not join together in a collective bargaining unit separate from that of other nonprofessional employes in that there is too much of a community of interest existing between them.(*20*) This runs contra to many prior PLRB decisions. Custodial and maintenance units have been very much the scheme of things in the past.(*21*)

Custodial employes have been joined in a unit with bus maintenance employes and mechanics.(*22*) In another case, custodial and secretarial employes were put in the same unit.(*23*) One early case established a separate maintenance unit and a separate custodial unit.(*24*)

§4.2.7 Secretaries, Clerical Employes and Aides

In several cases, the PLRB has found that units consisting of secretaries and clerks are appropriate for collective bargaining.(*25*) A media production specialist and a paraprofessional guidance counselor were included in a unit of secretarial and clerical employes in *Derry Area School District*,

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18. **Radnor Twp. S.D.**, 6 PPER 30.

19. **Marion Center Area School District**, 1 PPER 105; **Greensburg-Salem School District**, 3 PPER 37 and **General Braddock School District**, 5 PPER 104.

20. **Williamsport Area School District**, 7 PPER 68.

21. **North East School District**, 1 PPER 128; **Philipsburg-Osceola Area School District**, 1 PPER 47; **Carlisle School District**, 3 PPER 76; **Centennial School District v. PLRB, et al.**, 6 PPER 66 (C.P., Bucks County); **Forest Hills School District**, 7 PPER 283; **McKeesport Area School District**, 6 PPER 190 and **West Shore School District**, 6 PPER 200.

22. **Rose Tree-Media School District**, 5 PPER 106.

23. **Duquesne School District**, 6 PPER 135.

24. **Gateway School District**, 2 PPER 9.

25. **Johnsonburg Area School District**, 3 PPER 190; **McKeesport Area School District**, 5 PPER 19.

4 PPER 109. In *Gateway School District*, 3 PPER 185, secretaries who do borough and school taxes were included in a secretarial unit of the school district. Their work on borough taxes did not mandate their removal from that unit.

It is not unusual for the PLRB to include teachers aides and other school aides in units with clerical employes. *(26)* Aides have also been placed in units by themselves. *(27)*

A question has arisen in two cases as to just who is the employer of "follow-through aides" that are working in intermediate units. The PLRB has determined that these aides are the employes of the intermediate unit rather than of the school district. *(28)*

§4.2.8 School Crossing Guards

Both the PLRB and the Commonwealth Court have given their blessings to collective bargaining units of school crossing guards. *(29)*

§4.2.9 Vocational-Technical Schools

Vocational-technical schools, present a somewhat different situation than school districts. They are not operated by one school district, but rather by a group of school districts.

The PLRB has decided in *Parkway West Area Vocational-Technical School*, 1 PPER 25, that the school boards are the employers of the public employes working at the vocational school. It contradicts this decision by announcing that the vocational-technical school is the employer in *Erie County Area Vocational-Technical School*, 5 PPER 49 and *Wilkes-Barre Area Vocational-Technical School*, 4 PPER 107. The reason for the contrary decision in these cases does not appear from a reading of the decisions.

Collective bargaining units in vocational-technical schools

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26. Marion Center Area School District, 1 PPER 105, 5 PPER 42; St. Mary's Area School District, 6 PPER 227; Arin Intermediate Unit #28, 6 PPER 228 and Carbon-Lehigh Intermediate Unit #21, 7 PPER 268.

27. Westmoreland Intermediate Unit #7, 6 PPER 113.

28. Scranton School District, 7 PPER 13; Central Susquehanna Intermediate Unit #16, 7 PPER 313.

29. Township of Falls v. PLRB, 5 PPER 14, 14 Pa. Cmwlth. Ct. 494, 322 A.2d 412 (1974); Wilkes-Barre Area School District, 7 PPER 308 (School guards and cleaning matrons were included in this unit).

follow the course of those with the school districts. Teachers, counselors, librarians, nurses and other professionals are joined in a professional unit.(*30*) Similarly, nonprofessional units of custodial, maintenance, secretarial and cafeteria employes are regarded as appropriate.(*31*)

§4.3 County and Court Units

§4.3.1 Discussion

One of the most troublesome questions involving PERA in recent years has been that surrounding the joint employment by the county row offices such as the prothonotary's office, the clerk of court's office, the register of wills' office, the sheriff's office, etc. and the county commissioners. Part of this issue is the question of whether judges are the sole employer or the joint employer of such employes as probation officers, secretaries to judges, tipstaffs, criers, court reporters, etc. A second difficulty is so intertwined with this issue that it cannot be discussed separately. This concerns just who is "court related" and must be set up in a separate collective bargaining unit under Section 604(3).(32) Finally, there is the critical question of whether the Legislature could properly establish collective bargaining for public employes who are "directly involved with and necessary to the functioning of the courts of this commonwealth". There is no clear answer to anyone of these questions. The Commonwealth Court struggled with a solution in *County of Washington, et al v. PLRB, et al.*, 7 PPER 288, ____ Pa. Cmwlth. ____, 364 A.2d 519 (1976) and this case is now on appeal to the Pennsylvania Supreme Court. An extended discussion of cases decided prior to the *Washington County* case and the two Supreme Court cases dealing with like subject matter, is pointless in that the law is in such a state of flux that prior PLRB decisions will have little significance.(*33*)

Following is a brief summary of the key points in the three cited cases. In the *Sweet* case, **supra**, an employe organization had petitioned to represent all court-related employes in Washington County. This contemplated the register of wills' office, the sheriff's office, the prothonotary, the clerk of

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30. York County Vocational-Technical School, 6 PPER 198; Jefferson County-DuBois Area Vocational-Technical School, 6 PPER 259.

31. Wilkes-Barre Area Vocational-Technical School, 4 PPER 107.

32. 43 P.S. §1101.604 (3).

33. See Sweet, et al. v. PLRB, 5 PPER 6, 457 Pa. Cmwlth. 456, 322 A.2d 262 (1974); Costigan v. Phila. Finance Dept. Employes Local 696, 462 Pa. 425, 341 A.2d 456 (1975).

courts, domestic relations, district attorney, Orphan's Court, Court of Common Pleas, probation office, office of the justices of the peace, the public defender and the law library. The judges of Washington County petitioned to intervene in this case and the issue was eventually put before the Commonwealth Court. The judges asserted that they were employers of their personal staff and the administrative and personnel department of the courts. The PLRB had found that the county commissioners were the sole employers of these court-related employes and the Commonwealth Court agreed with this conclusion.(*34*) The Supreme Court reversed its decision and stated in part:

> "The relation of employer and employe exists when a party has a right to select the employe, the power to discharge him and the right to direct both the work to be done and the manner in which such work shall be done... The duty to pay an employe's salary is often coincident with the status of employer, but not solely determinative of that status...Our review of the present record convinces us that appellants (the judges) are at least an employer of some of the employes included in the bargaining unit comprised of court related employes."

Justice Roberts and Justice Nix indicated in a concurring opinion that PERA might be an impermissible intrusion upon the functioning of an independent judiciary. The *Sweet* case did not answer the question of constitutionality or provide a solid definition of "court related" employes.

The Supreme Court next addressed the issue in the *Costigan* case, supra. In that case, Robert Costigan, register of wills of Philadelphia, asserted that his predecessor in office had entered into a collective bargaining agreement with a union that was void for, among other reasons, failure to join the city of Philadelphia as joint employer in execution of the agreement. The court again addressed the difficult question of attributes of employment being placed upon various branches of the government and the confusion as to just who was the public employer. It stated as follows:

> "In the instant case, no single entity controls all of the terms of the employment relationship. The register of wills is conceded by all parties to have the exclusive

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34. 4 PPER 56, 12 Pa. Cmwlth. 358, 316 A.2d 665 (1974).

> power to hire, fire, promote, and direct the work of the employes. The city of Philadelphia pays most of the employe salaries and other compensation costs of the office and exercises considerable control over the fringe benefits accorded the employes, which include enrollment under the city's group life and health insurance plans and coverage by the city's pension plan. Thus the register and the city each exercise independent control over important 'conditions of the relation (which) are such that the process of collective bargaining may appropriately be utilized as contemplated by the act,' and both must be deemed employers for purposes of the act."

It should be noted that in footnote 2 of this case, the Supreme Court mentions that the argument was made that the court itself was a joint employer of some of the employes sought to be represented. The court declined to rule on this point because it had not been raised before the trial court. Thus, there remains a possibility that the judiciary is a joint employer, with the register of wills and the city of Philadelphia, of the employes in question.

Neither the constitutional issue nor the question of definition of court related employes was resolved in *Costigan.*

The PLRB reconsidered the *Sweet* case in the *Washington County* case, 5 PPER 110. The board stated as follows with regard to the employment situation:

> The board has determined that the judicial district is a "political subdivision" within the meaning of Section 301 (1) of Act 195, and the board of judges as representative of that judicial district is the public employer of all directly related employes of the respective district. The board in conformity with the Pennsylvania Supreme Court decision in *Sweet*, in recognition of the fact that judges are "at least an employer of some of the employes included in the bargaining unit comprised of court-related employes"; in reliance on the court's inherent constitutional rights and powers to "do all such things as are necessary for the administration of justice" and; in consequence of the statutory mandates contained in footnote (5) of the *Sweet* decision, finds it necessary to recognize the judicial district as a political subdivision and the judges as the public employer.

> The board also recognizes the county as a political subdivision within the meaning of Act 195. Both the county commissioners and the county row officers are officers of that subdivision and both possess some of the employer-employe indicia found in other areas of the law given emphasis by the Pennsylvania Supreme Court in the *Sweet* decision. The county commissioners, as the majority of the county salary board, in effect have the power to compensate the employes from the county treasury and designate the number of employes to receive such compensation. The row officers have the power to hire and fire and direct the method and quality of work of their respective employes. Together the employe indicia indicated by *Sweet*. Therefore, individual units would be created with the **joint employers being the county commissioners** and the **respective row officer**, i.e., as joint public employers of all of the employes of the register of wills office, etc.
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> With respect to all **non-court-related, non-row-office** county personnel, the board has assumed the posture that these county employes are employed by the county commissioners as representatives of the political subdivision. Likewise, the county commissioners have been statutorily deemed the administrative heads and are in direct control of the employes of county institution districts. An exception to the board's aforementioned policy lies with the county prison board which has been statutorily granted the power to "govern and manage" prison employes and operations. The county prison board possesses all of the indicia of a public employer and therefore the board recognizes county prison boards as the public employers of all county prison personnel. (Emphasis added.)

The PLRB thus established the board of judges as "at least an employer of some of the employes included in the bargaining unit comprised of court-related employes". The county commissioners and the county row officers were joint employers for employes in the row offices. As to non-court-related, non-row office county personnel, the county commissioners were employers. The same applied to county institution districts. (However, the county prison board was the employer of prison personnel.) Numerous like cases followed this ruling.(*35*)

Needless to say, the *Washington County* case was appealed to the Commonwealth Court along with cases from several other counties. Further complicating matters, in 1976 the County Code was amended to provide in essence that the board of county commissioners represent the judges and the county and all elected or appointed county officers in their dealings with unions.(*36*)

The final case in the developing trilogy is *Washington County, et al. v. PLRB, et al.*, 7 PPER 288, ____ Pa. Cmwlth. ____, 364 A.2d 519 (1976). In that case, Judge Bowman continued to wrestle with the three issues of 1) who is the employer, 2) who are court-related employes, and 3) is PERA's intrusion upon the judiciary constitutional. Although Judge Bowman cites the amended County Code, 16 P.S. §1620, he does not attempt to interpret it as it is not before the court. As to the issue of who is the employer or the joint employer, Judge Bowman, speaking for the Commonwealth Court, comes to the following conclusions. First, with regard to court related personnel:

> 1) "Limiting ourselves in this appeal to employes not employed in the row offices, it would seem that the judges enjoy joint employer status of those employes as to whom, by statutory law or the needs of judicial administration, they have independent control over important conditions of the employer-employe relationship, which are the subject of collective bargaining under Act 195; such important considerations include 'the right to select the employe, the power to discharge him, and the right to direct both the work to be done and the manner in which the work shall be done.' "(*37*)

2) As to employes in the office of the register of wills, the sheriff's office, the clerk of courts' office, and the prothonotary's office, the Commonwealth Court concludes that the row officers and the county commissioners are joint employers. As to the claim that the judicial district is a third joint employer of at least some of the employes, the court says:

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35. See **York County**, 6 PPER 240, 242, 244, 246, 248; **Bucks County Commissioners**, 6 PPER 281, 282.

36. 16 P.S. §1620.

37. 7 PPER 291.

> "Our reading of *Sweet* and *Costigan* does not compel a conclusion of public employer status to everyone who in public sector employment enjoys some indicia of employer authority or control over a public employe or group of public employes. If more than one public official exercises 'independent control over important conditions of the relation (which) are such that the process of collective bargaining may appropriately be utilized,' *Costigan*, supra, 462 Pa. at 434-35, 341 A.2d at 461, then they must be declared joint public employers. But whereas we deem to be the case with respect to row office employes, the public employes are performing functions for the courts which functions are not functions of the courts, we are of the opinion that the degree of control over them by the court, while real, is not sufficient to give the court public employer status as to such public employes." (*38*)

3) The Commonwealth Court declines to rule PERA unconstitutional in so far as it imposes an obligation on the judiciary to bargain collectively. In reaching this decision, it notes that PERA contains references to court-related employes and that it is not compelled to the conclusion that this intrusion on the judiciary is sufficient to render the statute unconstitutional.

§4.3.2 Court Related Employes

As noted before, the PLRB is prohibited from establishing a unit of "employes directly involved with and necessary to the functioning of the courts of this Commonwealth...to be included in any unit with other public employes,..." Such employes may nevertheless "form separate homogenous employe organizations".(*39*) Section 1001 prohibits court-related employes from striking and Section 805 provides for compulsory interest arbitration of impasses in collective bargaining. (*40*)

The Pennsylvania Supreme Court has handed down no decisions interpreting just who are "employes directly involved with and necessary to the functioning of the courts of this commonwealth". In the *Washington County* case, supra, Judge Bowman seems to approach the problem when he says:

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38. 7 PPER 293.

39. 43 P.S. §1101.604 (3).

40. 43 P.S. §1101.805 and §1101.1001.

> "Applying the test of *Sweet* and *Costigan* for the purpose of determining the role of judges as an employer necessarily requires the same test to be applied in determining what employes are 'court related'."(*41*)

From this brief statement may be derived the conclusion that if the judges are an employer or a joint employer, the employes in question are "directly involved with and necessary to the functioning of the courts of this commonwealth".

Following this line of reasoning, and following Judge Bowman's conclusion that judges are not joint employers with the row officers and the county commissioners, employes in the row offices would not be "court related". This is a rather troublesome conclusion in that the prothonotary, the clerk of courts, the register of wills, the sheriff, the district attorney, and the public defender, to name a few, do appear to meet the description "directly involved with and necessary to the functioning of the courts". Earlier PLRB decisions had included them in court related units.(*42*)

Since court related employes are prohibited from striking, a restricted view of what are "court-related employes" would mean that the court might find itself with its court reporters, judges' secretaries, probation officers, tipstaffs and criers, but no district attorney's office, no public defender, no prothonotary and no clerk of courts if there would be strikes in the row offices. This will surely be a factor in the ultimate determination of just who are "court-related employes".

§4.4 County Units

§4.4.1 Countywide Units

There is a great lack of consistency in the PLRB's determination of appropriate collective bargaining units for county employes. This has been further complicated by the confusion that has surrounded a final determination of who is public employer of the row office and the continuing question as to just who are "court-related" county employes. However, the earliest PLRB cases leaned toward all encompassing units of county workers. In *Fayette County Commissioners*, 2 PPER 11, a countywide unit of bridge and building laborers, mechanics and maintenance employes together with a variety of other

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41. 7 PPER 291.

42. Cambria County, 3 PPER 115; Armstrong County, 4 PPER 118.

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workers was regarded as appropriate. Excluded, however, were similarly situated county employes at the county home. Several years later, the PLRB decided that a unit of employes maintaining roads and bridges in the county was too narrow a unit in that there were other workers in the county doing work nearly identical to that the road crews petitioned for.(*43*)

In a case involving *Cambria County*, 3 PPER 115, the PLRB set forth general standards as to how it thought the questions should be decided in the counties. The board stated that in county cases it had consistently set up separate units of all court-related employes and separate units for all non-court-related employes. It said that it had excluded from these units employes at the county jail, the county home or the county hospital in that the jail, the county home and the county hospital frequently warranted separate treatment. It also noted that it could not accept the contention that each row office constituted a separate employer as this would "lead to chaos". Note that this conclusion of the PLRB was rejected in the *Sweet, et al. v. PLRB, et al.*, 5 PPER 6, 457 Pa. 456, 322 A.2d 262 (1974). The nonprofessional, court-related unit proposed by the PLRB included occupations such as court reporters, probation officers, the office staffs of the court, the district attorney's office, the sheriff's office, the register's office, the magistrate's office, the prothonotary's office, the public defender's office, the Mental Health Department, the detention home, the Child Welfare Department, the clerk of courts' office and the coroner's office. Although some of these offices may be court related, one must wonder how the Mental Health Department and the Child Welfare Department came to be court related.

The non-court-related offices whose employes were included in the unit were the offices of the county commissioners, the Civil Defense office, the controller, the treasurer, the tax assessor, the recorder of deeds, the registration office, the veteran's affairs office, the courthouse housekeeping and maintenance group, the road department, the weights and measure office, the Agriculture Department and the Procurement Department.

Obviously, both of these units would have required separate elections to determine whether professional employes desired to be included in nonprofessional units. The general pattern set up in this case was followed in several other

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43. Luzerne County, 3 PPER 203.

cases.(*44*) In one case, a petition to sever seven assessor clerks from a broad non-court-related unit was rejected as contemplating over-fragmentation.(*45*) Secretaries to the district magistrates were held to be court related, properly part of a larger court-related unit and inappropriate for separate representation.

In *Armstrong County*, 4 PPER 118, the PLRB reiterated its intention to classify employes into court related and non-court-related units, each containing separate units for first level supervisors and nonsupervisory employes. It repeated that it intended to exclude county homes and persons from such groupings because of separate communities of interest and the rules applicable to guards.

The PLRB tended to deviate from its stated intention in several cases. In *Dauphin County*, 6 PPER 307, the board granted approval to a unit of nonprofessional, nonsupervisory employes in the following occupations; custodians, printers, elevator operators, mail room employes and maintenance employes. If the PLRB were insisting on broad units of non-court-related employes, one would presume that road maintenance employes, civil defense employes and the other non-court-related employes of the county would have been in this unit.

Noting the question as to where Civil Defense radio operators belong, one will see that in two cases, they were placed by themselves.(*46*) In another case, they were excluded from a prison unit as not being guards.(*47*)

§4.4.2 Social Programs

Many counties in Pennsylvania, alone or in conjunction with other counties, operate social programs such as Child Welfare Bureau, mental health and mental retardation programs, adult services programs, drug and alcohol abuse programs, etc. By and large, the funding for these programs comes from the state or possibly the federal government. A degree of control is maintained over the programs by the commonwealth but the counties will hire and fire, issue

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44. **Schuylkill County**, 3 PPER 137; **Bradford County**, 3 PPER 267; **Lackawanna County**, 3 PPER 259.

45. **Clarion County Commissioners**, 6 PPER 315.

46. **Lebanon County**, 6 PPER 165; **Dauphin County Commissioners**, 6 PPER 319.

47. **Clarion County Commissioners and Sheriff**, 6 PPER 304.

paychecks, control the daily work and, for all practical purposes, run the programs. The commonwealth may set standards and, in this fashion, control hiring but it does not really operate the program.

Most frequently, two questions arise relative to such organizations: 1) Who is the employer of the public employes — the commonwealth, the counties or perhaps a hospital that is undertaking to perform services on a contract basis? 2) What is an appropriate unit into which employes may be placed for bargaining?

An early case in this area reviewed the factual situation and produced answers to both of the above questions which is generally the scheme of PLRB unit determinations. The employer was found to be the county government, not the commonwealth. An appropriate unit was determined to be the sum total of the social service workers whether they be employed in the Children's Bureau, mental health and mental retardation programs or in adult services.(*48*) At approximately the same time as this decision, the PLRB had handed down a decision rejecting the argument that the commonwealth, rather than a county, was the employer of public employes working in the social programs.(*49*) There is some confusion in the PLRB's mind as to who is the employer when more than one county is involved. In *Clearfield and Jefferson Counties*, 3 PPER 261, the board was consistent and held that a joint board of the commissioners from the two counties was the employer. However, in *Carbon, Monroe and Pike Counties*, 6 PPER 46, 8 PPER 129, the PLRB held that the mental health program itself, and not the counties or the commonwealth, was the employer.(*50*)

In another case, *Luzerne County Social Services*, 5 PPER 58, the contention was made that the program was an employer. The PLRB rejected this contention and concluded that there were two separate employers, the Luzerne County Commissioners and the Wyoming County Commissioners, who

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48. Northampton County Children's Bureau, 2 PPER 122.

49. Dauphin County, 2 PPER 112. See also Northumberland County, 2 PPER 189; Northampton County, 3 PPER 128; County of Berks, 4 PPER 8 and Juniata Valley Tri-County Mental Health and Mental Retardation Program, 7 PPER 261.

50. See also Columbia, Snyder, Montour, Union Mental Health/Mental Retardation Program, 7 PPER 256, 8 PPER 43.

exerted control over persons working within the respective counties. The decision in the *Carbon, Monroe and Pike Counties* case, to the effect that a **program** is the employer is inconsistent with prior decisions and appears to be wrong.

Drug and alcohol abuse programs are often handled in part by counties and in part by hospitals that receive funding from the counties in return for their agreement to conduct the program according to certain standards. In the *Harrisburg Hospital* case, 6 PPER 195, the hospital had undertaken this and when its employes sought to organize, it asserted that the county or the commonwealth was at least a joint employer. The Dauphin County Court disagreed and held that the hospital itself was the sole employer. The issue in this case became moot when jurisdiction over hospitals vested in the NLRB.(*51*)

PLRB decisions with regard to the appropriateness of the unit have been consistent. The PLRB has joined all of these social service groups into single units, allowing professional employes to vote as to whether they desire to be included as required by the act.(*52*) A mental health and mental retardation program previously excluded from a unit of social workers, child welfare workers and adult service workers was included by unit clarification.(*53*) The PLRB would not allow a separate unit of adult services workers, but concluded that they should be included in a larger social service unit.(*54*) Probation officers have not been regarded as social workers and are not included in the units discussed herein.(*55*)

One should note that when social services are contracted out to a separate employer as in the *Harrisburg Hospital* case, 6 PPER 195, that institution may very well be the employer and a bargaining unit would be limited to the employes of that one particular employer.

§4.4.3 Prisons

In understanding prison units, it will be helpful to refer to the section of this book on "guard units". Section 604(3)

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51. 7 PPER 193, 24 Pa. Cmwlth. 634, 358 A.2d 134 (1976).

52. **Northumberland County**, 2 PPER 189; **Dauphin County**, 2 PPER 112; **Northampton County**, 3 PPER 128; **Lehigh County**, 4 PPER 14; **Westmoreland Co. Commissioners**, 8 PPER 132.

53. **Bucks County**, 7 PPER 328.

54. **Allegheny County**, 7 PPER 208.

55. **Montgomery County**, 3 PPER 38.

prohibits including prison guards in units with any other persons. In *Lackawanna County*, 3 PPER 266, the PLRB decided that not only guards but "all employes who are necessary to the continual functioning of the prison" should be placed within guard units. This appears to have happened in *Bradford County*, 3 PPER 267, where guards, matrons, cooks and radio operators were included in a prison unit of employes. Employes working on a prison work relief program who gave counseling and other help to participants in the program, were excluded from the prison guard unit since they did not really function as guards.*(56)*

§4.4.4 County Homes and County Farms

The PLRB has been consistent in holding appropriate, units of employes at the county home.*(57)* In *Bucks County Commissioners*, 6 PPER 312, the PLRB did hold that a unit of registered nurses, public health nurses, occupational therapists, therapists and pharmacists at both the county home and in the county Health Department constituted an appropriate bargaining unit. It is interesting to note that this unit was not limited to just the county home.

Although the PLRB established a separate unit for county home employes it declined to include in that unit farmers who operated the county farm and who worked different hours and for different supervisors than those at the county home.*(58)* In another case, the PLRB decided that a nonprofessional unit of county farmers was appropriate.*(59)*

§4.4.5 Effect of State or Federal Funding

The contention has been made in several cases that because the state or the federal government funds a particular program that the county is not the employer or that the employes working for the particular program are temporary in that the federal or state funding may be withdrawn and the individuals working for that program left without jobs. The PLRB rejected these arguments in most of the cases dealing with this subject. The PLRB regarded the employes of child care services and mental health and mental retardation

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56. Lycoming County Prison Board, 6 PPER 114.

57. Fayette County, 2 PPER 11; Schuylkill County, 3 PPER 137; Northampton Co. Home, 5 PPER 70.

58. Lycoming County Commissioners, 6 PPER 317.

59. Mifflin County Commissioners, 7 PPER 272.

programs as being county employes and appropriately organized into county units.(*60*) Federal Emergency Employment Act funds used to support particular employes working for the county did not cause their exclusion from a unit of county employes.(*61*) Parties could not stipulate to the exclusion of such employes.(*62*) This same rule has been applied in school district cases where federal funds were used to employ certain teachers or specialists.(*63*)

In several cases, the PLRB has declined to include employes on federal or state programs in units of county or municipal workers. Employes working for "Operation Mainstream", supported by federal money, were not included in a unit with other city workers. The PLRB said that the city had only the power to hire and fire and that all other control of the program resided elsewhere. In a *Delaware County* case, 6 PPER 203, three employes hired on a federal program that was to expire within one year were regarded as casual employes and were excluded from a unit of other workers. This case seems inconsistent with school district holdings that substitute teachers should be included in bargaining units. In another case, employes supported by federal money were excluded from a county unit although they were allowed to form their own collective bargaining unit.(*64*)

In a case involving a CETA (Comprehensive Employment and Training Act) group of employes, the PLRB said that the issue in these cases was continuation of the program. If the county had indicated that the program would terminate, the PLRB would regard them as casuals and exclude them from the bargaining unit. If the county commissioners indicated a willingness to continue the program, employes would be included in the unit.(*65*) Federally funded employes were regarded as working for the program, not the county, and were excluded from a prison unit.(*66*)

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60. **Dauphin County**, 2 PPER 112; **Northumberland County**, 2 PPER 189.

61. **Franklin County**, 3 PPER 50; **Bethlehem Township**, 3 PPER 154.

62. **Northampton County Area Community College**, 3 PPER 53.

63. **Keystone Central School District**, 3 PPER 194; **McKeesport Area School District**, 5 PPER 19; **Northeastern School District**, 5 PPER 34; **Union Area School District**, 3 PPER 231; **Hollidaysburg Area School District**, 6 PPER 3; **Tussey Mountain School District**, 6 PPER 124. **Also see Carroll Township**, 4 PPER 4 and **Dauphin County**, 5 PPER 46; **City of Pittsburgh**, 8 PPER 119.

64. **Allegheny County**, 4 PPER 39.

65. **Venango County Commissioners**, 7 PPER 314.

66. **Lycoming County Prison**, 6 PPER 114.

§4.4.6 Effect of Civil Service Status

The contention has been made in several cases that Civil Service employes should not be included with other employes because their conditions of employment are to a certain extent determined by the Civil Service regulations. This contention has been rejected.(*67*)

§4.5 Hospital Units

§4.5.1 Introduction

A question raised very early in the life of PERA was the appropriate bargaining unit for hospitals. Hospitals are structured much the same and lend themselves to fairly uniform collective bargaining units. The case that set the tone for these units was *Women's Medical College of Pennsylvania*, 1 PPER 129. In that case, the PLRB held that a hospitalwide unit of nonprofessional employes was not appropriate and that separate units for maintenance employes and service employes were appropriate. It noted that LPNs (licensed practical nurses) and other technical employes should not be included in service and maintenance units. This set the stage for later findings that LPNs and technical employes be placed in separate units. Subsequent cases developed separate bargaining units for registered nurses and pharmacists. Following is a more complete description of these units.

§4.5.2 Technical Employes and LPNs

Licensed practice nurses (LPNs) are individuals who have completed high school and who have received about one year of post-high school training in practical nursing. They are licensed by the state. Hospitals also employ laboratory technicians who may have had as little as one year of post-high school training or who may have as much as three years of training. X-Ray technicians receive about two years of post-high school training. Nuclear medical technicians also receive about two years of training. In NLRB practice, all of these individuals are regarded as technical. The term "technical employe" is an NLRB categorization of persons who occupy a position between a rank and file employe and a professional employe. Their educational background is not sufficient to constitute them professionals, but their training has raised them somewhat above the level of rank and file workers.

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67. **Franklin County**, 3 PPER 50; **City of Lebanon**, 6 PPER 167; **Dauphin County**, 5 PPER 46.

It will be noted that PLRB practice distinguishes LPNs from other technical employes in hospitals. The basis for the distinction seems to be the technical employe's comparative lack of physical contact with patients.

Hospitals also contain many other jobs titled "technician". EKG technicians, EEG technicians, operating room technicians, darkroom technicians and so forth, are generally individuals with little, save on-the-job, training. In NLRB practice, they are excluded from true technical units and placed in rank and file positions.

The PLRB decisions have tended to group employes with the word technician in their titles. In *Reading Community General Hospital*, 2 PPER 7, EKG technicians, EEG technicians, X-Ray technicians, biochemists and inhalation therapy technicians were joined together in a technical unit which excluded LPNs.(*68*)

The PLRB has also established units limited to LPNs.(*69*) In three cases, the PLRB included LPNs in rank and file, nonprofessional units.(*70*) This was contrary to the general procedure where LPNs were excluded from service and maintenance units.(*71*) In one case, LPNs were included in a professional unit.(*72*)

§4.5.3 Service Employes

Service employes in hospitals have been held by the PLRB to include nurses aides, servicemen, laundry people, cooks, linen room attendants, storekeepers, ward clerks and orderlies. Groups of these and like persons are an appropriate bargaining unit.(*73*) In the last cited case, the PLRB deviated from its

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68. See also Metropolitan Hospital, 2 PPER 72; Mercy Hospital, 3 PPER 338; Wills Eye Hospital, 3 PPER 380; Westmoreland Hospital Association, 4 PPER 62.

69. St. Luke's and Children's Medical Center, 1 PPER 121; Memorial Osteopathic Hospital, 5 PPER 6; Erie Osteopathic Hospital Association, 2 PPER 128; Wilkes-Barre General Hospital, 3 PPER 30.

70 Blair County Commissioners, 2 PPER 25; Dauphin County Commissioners, 2 PPER 46; Suburban General Hospital, 2 PPER 181.

71. Butler County Memorial Hospital, 4 PPER 26 and Westmoreland Hospital Association, 4 PPER 62.

72. Temple University, 6 PPER 126.

73. Women's Medical College, 1 PPER 129; Butler County Memorial Hospital, 4 PPER 26; Temple University Hospital, 2 PPER 15; Lankenau Hospital, 2 PPER 31; Metropolitan Hospital, 2 PPER 72, 2 PPER 125; Hamot Medical Center, 2 PPER 96; Jeanette District Memorial Hospital, 4 PPER 156.

general course and excluded ward clerks from the unit. In *St. Margaret Memorial Hospital*, 6 PPER 24, it was determined the parts of a service unit were inappropriate for bargaining and the representation petition was dismissed.

The PLRB will on occasion find units of service and maintenance employes to be appropriate.(*74*) The last cited case contains a good discussion on community of interest and over-fragmentation of the unit. In one case, the board, in a burst of enthusiasm, combined service and maintenance employes in a unit with technical and administrative employes. This case is one example of the ''wall-to-wall'' unit sought by many hospitals.(*75*)

§4.5.4 Maintenance Employes

There have been many findings by the PLRB as to the appropriateness of a unit of maintenance employes. Maintenance employes include painters, carpenters, plumbers, house engineers, utility men and like trades people.(*76*) The propriety of maintenance units was given the blessing of the Commonwealth Court in *Allegheny General Hospital v. PLRB*, 5 PPER 21, 14 Cmwlth. Ct. 381, 322 A.2d 793 (1974). In one case, the County Court of Allegheny County overruled a finding of the PLRB that an engineering and maintenance unit was appropriate and directed that a larger unit be found appropriate.(*77*) The decision of the county court contains a very informative discussion of over-fragmentation and community of interest.

§4.5.5 Other Employe Units

In *Women's Medical College*, 1 PPER 129, it was suggested that a unit of adminstrative employes was also appropriate. No such units appeared to have been formed. The only clerical employes that are discussed in the cases are the ward or unit clerks who work at the desks in the various

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74. St. Luke's and Childrens Medical Center, 1 PPER 65; Westmoreland Hospital Association, 4 PPER 62.

75. Erie Osteopathic Hospital Association, 2 PPER 128.

76. Albert Einstein Medical Center, 1 PPER 79, 1 PPER 81; University of Pennsylvania, 1 PPER 102; Temple University, 2 PPER 15; Lankanau Hospital, 2 PPER 31; Metropolitan Hospital, 2 PPER 72, 2 PPER 126; Memorial Hospital of Roxborough, 3 PPER 306.

77. Columbia Hospital, 2 PPER 146, (C.P., Allegheny County).

medical-surgical floors. The ward clerks are generally included with nonprofessional employes in service units.(*78*)

The PLRB has established an appropriate bargaining unit which consists just of pharmacists. This is a trifle unusual in that the NLRB will most frequently create units including all professional employes. In hospitals, there may be many other professionals who could join with pharmacists in a much broader unit. Nevertheless, the PLRB has established these units and the Commonwealth Court had sustained them.(*79*)

Separate units for registered nurses are deemed appropriate in both PLRB and NLRB practice.(*80*) In teaching hospitals, there have been several holdings where faculty nurses are excluded from registered nurses working in the hospital.(*81*) However, nurse anesthetists and clinical nurses have been included in the same unit.(*82*) One rather peculiar holding included LPNs, registered nurses and specialty nurses in the same bargaining unit, contingent upon a vote by the professional employes to be included with nonprofessionals.(*83*)

A question arises as to just how to treat interns and residents in hospitals. The Commonwealth Court and then the Pennsylvania Supreme Court concluded that interns and residents were in the hospital as students and that they did not fit within the definition of "public employe".(*84*)

§4.6 City, Borough, Township and Authority Units

As heretofore observed, the PLRB has sought to avoid prohibited over-fragmentation in county units with some

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78. **Butler County Memorial Hospital**, 4 PPER 26; **Columbia Hospital**, 4 PPER 141; and **Cumberland County Nursing Home**, 5 PPER 53.

79. See **John F. Kennedy Memorial Hospital**, 1 PPER 126; **Albert Einstein Medical Center**, 2 PPER 98, 4 PPER 42 (C.P., Philadelphia County) and 6 PPER 8, 17 Pa. Cmwlth. 91, 330 A.2d 264 (1975); **Presbyterian Medical Center**, 3 PPER 298 and **Temple University Hospital**, 6 PPER 126.

80. **Medical College of Pennsylvania**, 4 PPER 83, **Northampton County Home**, 5 PPER 70; **Albert Einstein Medical Center**, 7 PPER 8.

81. **Abington Memorial Hospital**, 2 PPER 18; **Pittsburgh Hospital Association**, 2 PPER 43.

82. **Temple University**, 5 PPER 37; **St. Francis General Hospital**, 2 PPER 79.

83. **Harrisburg Polyclinic Hospital**, 3 PPER 210. See also **Albert Einstein Medical Center v. PLRB**, ____ Pa. Cmwlth. ____, 374 A.2d 761 (1977).

84. **Wills Eye Hospital, et al. v. PLRB**, 5 PPER 93, 15 Pa. Cmwlth. 532, 328 A.2d 539; 7 PPER 239, ____ Pa. ____; 369 A.2d 711 (1977).

diligence.*(85)* This diligence is not as apparent in its decisions dealing with boroughs, cities, townships and authorities. Rather than units of all nonprofessional employes, the PLRB has shown a tendency to establish bargaining units of service and maintenance employes and to exclude clerical employes.*(86)* These cases may be justified on the basis of the community of interest existing between sanitation drivers, highway department workers and the blue collar employes concerned. Also, the small size of the municipalities results in clerical workers often being excluded as confidential employes.*(87)*

Separate units for the water filtration plant and sewer operation have been held to be appropriate.*(88)* Such persons have also been excluded from broader units of clerical and maintenance employes.*(89)* In contradiction to this decision, the PLRB held that a unit of maintenance employes at the water filtration plant was inappropriate in that it would result in over-fragmentation.*(90)* Other cases establishing separate units for water and sewer employes involved authorities where the units appeared to be all inclusive.*(91)*

The problem of joint employment raised its head in the case *City of Williamsport*, 7 PPER 144, in that the mayor exercised authority over most employes, but the treasurer and the mayor shared joint control over employes in the treasurer's office. The board determined that two units would be appropriate, one for employes of the city and the other for the employes of the treasurer and the city.

§4.7 College and University Units

Cases involving colleges and universities are not that plentiful. Several rules or tendencies toward rules can be derived but the bulk of these cases deal with individual matters that do not provide a great deal of guidance on the broad issues that can arise at colleges and universities.

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85. 43 P.S. §1101.604 (1).

86. **Borough of Collingdale**, 3 PPER 18; **City of Lock Haven**, 4 PPER 120; **Rostraver Township**, 5 PPER 75.

87. **Borough of Homestead**, 2 PPER 14.

88. **Borough of Hollidaysburg**, 6 PPER 293.

89. **Borough of Hollidaysburg**, 6 PPER 186.

90. **Morrisville Borough**, 4 PPER 100.

91. **Wyoming Valley Sanitary Authority**, 1 PPER 53; **Warminster Township Municipal Authority**, 3 PPER 299; **Williamsport Municipal Water Authority**, 8 PPER 85.

One issue that did come before the board involved the appropriate unit for universities with branch campuses. An employe organization sought to organize the Johnstown Campus of the University of Pittsburgh. The PLRB determined that a unit consisting of one branch of the university was not appropriate but that unit should consist of multiple branches. It based its decision on the fact that 1) the employer was the commonwealth of Pennsylvania, 2) there was a common education program followed by all of the schools, 3) the university established the standards for the employes at all of its campuses, 4) the campuses were not attuned to the needs of the local geographical area, 5) the branch campuses were basically feeder schools for the university in Pittsburgh, 6) the entire organization structure was tied to Pittsburgh and 7) there was very little interchange of teachers between the various campuses. Other factors were discussed but these appeared to be the key factors.(92)

A petition was filed to represent the faculty at the 18 campuses of Penn State University. The facts were remarkably like those in the *University of Pittsburgh* case but the PLRB reached a completely contrary decision. A unit of 18 campuses was not regarded as appropriate.(93) These two cases are an example of near identical facts producing a completely opposite decision. Unfortunately, there is no discussion in the two cases as to why contrary conclusions were reached in what seem companion cases.

The PLRB adopted an NLRB decision in *Temple University*, 3 PPER 209. The NLRB decision is *Fordham University*, 193 NLRB No. 23 (1971). That decision and the *Temple University* decision conclude that it is not proper to include the faculties of law schools, medical schools and dental schools with faculties of undergraduate schools. The factors cited include different physical locations for the professional schools, differences in requirements for faculty, salary levels, licensing and accreditation differences, differences in the school year, etc.(94)

Nonprofessional employes have generally been placed in large nonprofessional units. In *University of Pittsburgh*, 3

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92. University of Pittsburgh, 3 PPER 212.

93. Penn State University, 3 PPER 165.

94. See also Pennsylvania State University, 8 PPER 102.

PPER 122, employes in the printing and mailing department were not allowed to form their own bargaining unit in that the workers had no craft identity or special skills. Skills utilized by them were similar to those used in other departments and their job classifications existed in other departments.

Also, there was an interchange of employes. In another case, clerks and postal clerks were included in a service and maintenance group for reasons similar to those cited above.(95) In another *Temple University* case, 7 PPER 52, the board held that a unit of computer personnel was not appropriate for the purposes of collective bargaining in that these duties were more in support of other service employes at the Temple campus.

In *Community College of Philadelphia*, 7 PPER 116, the board decided that a unit of part-time instructors was not appropriate because of the high turnover rate, the varying hours of work per week and the scattered nature of their teaching. Oddly enough, the board found that a unit of visiting lecturers did not result in fragmentation and was an appropriate unit for collective bargaining.

In *Commonwealth of Pennsylvania*, 7 PPER 95, the PLRB determined that it was inappropriate to include nonfaculty administrators in a unit of faculty administrators. Faculty administrators were different from nonfaculty administrators by virtue of considerable differences in benefits some of them derived from legislation applicable only to faculty and from various prerogatives that might be enjoyed only by faculty.

§4.8 Commonwealth Units

The largest employer in the commonwealth of Pennsylvania is the commonwealth itself. When PERA was enacted, treatment of commonwealth employes loomed large on the horizon. Undoubtedly, this is one of the reasons for the rule against over-fragmentation.(96) Without the mandate against over-fragmentation, the PLRB might very well have established small collective bargaining units all over the state. In *Commonwealth of Pennsylvania*, 1 PPER 31, the PLRB has a discussion of the effect of over-fragmentation on the commonwealth. The classifications involved in that case were

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95. Temple University, 3 PPER 147.

96. 43 P.S. §1101.604 (1) and (4).

under the control of the governor as opposed to control by the Legislature, the judiciary or independent agencies, boards or commissions. Individual agencies had control of application of standards set by the executive board, but compensation, fringe benefits, working conditions and job titles were highly centralized. Ten major occupational categories for the 100,000 employes being considered were listed. The PLRB established statewide units and in doing so gave consideration to the mentioned occupational groupings under the commonwealth's classification and compensation plan. It also noted that no meaningful negotiations on overall policies could be conducted without the pres[illegible]he governor or his representative, the executive boa[illegible]er, changes in compensation, fringe benefits, e[illegible]ld not be accomplished without the concurrence of the governor or executive board. Also, as to the particular units in question, the board noted that they were bound together by the physical effort involved in their work. Obviously, other collective bargaining units would have other attributes related to the precise work they perform.

Units of the individual agencies have generally not been permitted by the PLRB.*(97)* Once established, efforts to fragmentize statewide units into smaller units on the basis of "craft" or profession have been unavailing.*(98)*

There have not been many cases involving statewide units. The principal issues in this area seemed to have been resolved and extended discussion of statewide units serves little purpose.

§4.9 Professional Employes

PERA defines professional employes as follows:

> "(7) 'Professional Employe' means any employe whose work is: i) predominantly intellectual and varied in character; ii) requires consistent exercise of discretion and judgment; iii) requires knowledge of an advanced nature in the field of science or learning customarily acquired by specialized study in an institution of higher learning or its equivalent; and iv) is of such character that the output or

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97. **State Workmen's Insurance Fund**, 1 PPER 136; **Commonwealth of Pennsylvania**, 2 PPER 4; **Commonwealth of Pennsylvania**, 2 PPER 101.

98. **Commonwealth of Pennsylvania**, 4 PPER 101 and **Commonwealth of Pennsylvania**, 7 PPER 89; **Commonwealth of Pennsylvania**, 8 PPER 50.

result accomplished cannot be standardized in relation to a given period of time."*(99)*

PERA provide that the board shall "Not decide that any unit is appropriate if such unit includes both professional and nonprofessional employes, unless a majority of such professional employes vote for inclusion in such unit."*(100)*

Each of the four qualifications stated in the definition must be met to constitute an employe a professional. There has been comparatively little comment or difficulty with understanding the first qualification, that is that the work be predominantly intellectual and varied in character.

Several cases have dealt with the question of what is "consistent exercise of discretion and judgment". Certified sewage treatment operators were not professionals in that their work was rather routine and consisted of making relatively simple tests. Further, no formal education was required of them.*(101)* Degreed technologists at a hospital were not regarded as exercising independent judgement. The board noted that technologists did work identical to that of technicians and that the only difference between them and technicians was a degree. This decision is somewhat suspect in that technologists are ordinarily expected to perform on a higher plane than technicians and are paid accordingly.*(102)* Fiscal technicians were not regarded as consistently exercising discretion and judgement and their work was not considered to be predominantly intellectual.*(103)* A paralegal employe in the district attorney's office was not considered a professional because the attorneys and not the paralegal exercised independent judgement.*(104)* Building inspectors for the *Borough of Lansdale*, 7 PPER 114, neither exercised the requisite discretion nor were required to have the requisite knowledge to constitute them professional employes.

Ordinarily, the troublesome feature of professional exemption evolves around the necessity for a college degree. It should be noted that a professional degree is not required. The

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99. 43 P.S. §1101.301 (7).

100. 43 P.S. §1101.604 (2).

101. **Warminster Township Municipal Authority**, 3 PPER 299.

102. **Mercy Hospital**, 3 PPER 338.

103. **Commonwealth of Pennsylvania**, 6 PPER 110.

104. **York County**, 6 PPER 238.

definition states that the work expected of the employe must be of the sort requiring the knowledge that is "customarily acquired by specialized study in an institution of higher learning or its equivalent." A nondegreed person may very well be capable of performing in this capacity. In the case in which this was discussed an assessor was held not to have been expected to have such knowledge.*(105)* It should also be noted that the mere presence of a degree does not constitute an individual a professional employe. If the duties required of the individual are rather routine and do not meet the standards of a professional, that person is not a professional although he may be degreed.*(106)* Also, it is the definition stated in PERA that is controlling and other definitions of professional employes such as those found in the Public School Code, need not be met.*(107)* Similarly, state certifications are not necessary to constitute a person a professional. This case involved a hygienest working in a school.*(108)*

Probation officers have generally been found to be professionals based on the evidence submitted.*(109)* In one PLRB decision, it made a finding that probation officers and trainees were professionals even though the record was lacking in testimony to support this.*(110)*

One final not is appropriate; the act provides for a vote to determine whether professional employes desire to be included in a unit with nonprofessional employes. Many of these preference elections have been held under the act. They are mandatory. The parties may not waive the preference vote by professional employes.*(111)*

§4.10 Guards-General

Section 604, 43 P.S. §1101.604 (3) directs the PLRB in determination of bargaining units:

> "(3) Not permit **guards at prisons and mental hospitals**..., or any individual employed as **a guard to enforce against employes and other persons, rules to protect property of**

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105. **Allegheny County**, 1 PPER 72.

106. **York Day Nursery and Kindergarten**, 3 PPER 101.

107. **Great Valley School District**, 1 PPER 13.

108. **Northern Tioga School District**, 3 PPER 107.

109. **Berks County**, 7 PPER 48.

110. **Court of Common Pleas of Columbia and Montour Counties**, 7 PPER 36.

111. **Northampton County**, 2 PPER 122; 3 PPER 128.

the employer or to protect the safety of persons on the employer's premises to be included in any unit with other public employes, each may form separate homogenous employe organizations of the latter designated employe group may not be affiliated with any other organization representing or including as members persons outside of the organization's classification." Emphasis added.

Two types of guards exist under PERA:

(1) "...guards at prisons and mental hospitals

(2) "...guard(s) to enforce against employes and other persons, rules to protect property of the employer or to protect the safety of persons on the employer's premises...."

Guard units will be discussed under those headings. However, one must know what guards are before they can be excluded from other units (a mandatory exclusion) or included in their own units, to which special interest arbitration provisions **may** be applicable.(*112*) One further problem concerns whether the "guards" are policemen and/or firemen under Act 111, 43 P.S. §217.1, et seq. Employes subject to that act are excluded from coverage by PERA.

§4.10.1 Guards at Prisons and Mental Hospitals

There is no definition of "guards at prisons and mental hospitals." However, the purpose of the act seems clear. Neither inmates nor the public should be threatened by strikes of guard personnel at prisons or mental hospitals. To prevent this, such guards are 1) given their own units, 2) denied the right to strike and 3) given the right to resort to compulsory interest arbitration if they are unable to reach agreement with their public employer about their wages, hours and terms of employment.(*113*)

By statute and by logic, a mixed unit of guards and nonguards is wrong and prison personnel may be grouped into guard and nonguard units for bargaining.(*114*) However, where maintenance and support personnel spend substantial

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112. 43 P.S. §1101.805.

113. 43 P.S. §1101.805 and §1101.1001.

114. **Luzerne Co. Prison**, 1 PPER 70.

time guarding prisoners, they should be included within the guard unit since they are actually guards.

In *Lackawanna Co.*, 3 PPER 266, the PLRB said:

> "The act is to be administered in light of the public policy which recognizes the paramount right of the citizens of the commonwealth to keep inviolate the guarantee of their safety and welfare. The board, therefore, in administration of the act must include in the prison unit, not only those employes who fit literally into the category of guard, **but all employes who are necessary to the continual functioning of the prison**. Otherwise the public policy of the act would be defeated by permitting employes necessary to the functioning of the prison, who are not within the literal definition of the term 'guard', to engage in a nonenjoinable strike. We therefore, must include in the prison guard unit all remaining employes at the prison who are necessary to the continual maintenance and operation of the prison."

The rule in this case is followed in *Delaware Co.*, 3 PPER 361, 4 PPER 45.(*115*)

§4.10.2 Guards of Persons and Property

The other class of guards is described as one employed:

> "...to enforce against employes and other persons, rules to protect property of the employer or to protect the safety of persons on the employer's premises...."(*116*)

Nearly identical language to this is found in the NLMRA, 29 USCA §159 (b) (3), Section 9(b) (3):

> "(b)...**Provided**, That the board shall not...(3) decide that any unit is appropriate for such purposes if it includes, together with other employes, any individual employed as a guard to enforce against employes and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of

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115. See also, Warren Co., 3 PPER 331, where sheriff's deputies were regarded as prison guards and York County Prison Board, 6 PPER 174, where record clerks and the warden's personal secretary were included in a unit of prison guards and matrons because of interchange with security force and community of interest with the prison guard force.

116. 43 P.S. §1101.604 (3).

> employes in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employes other than guards."

The purpose of the federal and state exclusion is obviously the same and federal decisions have been used in interpreting the statute.(117) The *Delaware Co.* case, **supra**, involving campus security guards who were found to be guards of persons and property, contains the following comment that may provide a guide as to how the PLRB will apply the guard exclusion:

> "The duties of the guards enumerated include responsibility to enforce the rules of the college to protect the property or to provide for the safety of any persons on the campus. Each of the duties set forth related to the enforcement of these rules against employes and students. Testimony elicited at the hearing also indicated that the responsibilities of the guards included safeguarding the parking lots after dark to protect individuals from harm, particularly mugging or rape, and this included both the employer or other individuals employed in the school as well as students.
>
> The testimony indicated that the security guards have a responsibility in identifying persons on the campus, requiring identification should a person be acting in a suspicious way, which may endanger the property of individuals, or the safety of persons on the property. The security guards also have the responsibility of safety of individuals and protection of property of the employer as it relates to investigating fires or investigating the sounding of a fire alarm in the buildings. It was further testified that the security guards do not at present have the power of arrest, but that this power has been proposed. The security guards are uniformed.
>
> The testimony elicited during the course of the hearing clearly indicated that both the responsibility and the function of the persons engaged as security guards is to enforce against employes and other persons the rules of the employer to protect the property of the employer as well as to protect the safety of persons on the college

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117. **Falls Twp. v. PLRB**, 5 PPER 14, 14 Pa. Cmwlth. 494, 322 A.2d 412; **Delaware Co. Com. College**, 6 PPER 119.

> campus. The persons whose safety is protected are the fellow employes, the faculty and the students, as well as visitors on the property."

Two PLRB cases are decided on a most narrow point. In *Com. Perry S.D.*, 3 PPER 335 and *Conemaugh Valley S.D.*, 3 PPER 349, the PLRB considers custodian-guards at schools. The board decides that they are not security guards to be excluded from maintenance units although they are indeed guards; it says:

> "The purpose of the act's provision in Article VI, in excluding certain guard employes from other units of public employes, is so that in the event of labor unrest, the employer has a certain core of employes on which he can rely to protect his premises from his employes. It would appear that the parties have mistaken the purpose of this provision in the act, and the employer has gone to great lengths to show that this employe does perform certain guard duties but they are entirely unrelated to the provisions and purposes of the act relating to this classification of guards. There is absolutely no testimony on the record that (the custodian-guard) performed any duties of the nature as required by the act to require his exclusion from the present unit. Although this employe is technically a guard, and does protect the employer's premises, there is nothing on the record to indicate that he is employed to protect the premises of the employer against the employes in the event of labor unrest and, therefore there would be no reason to exclude this employe from the petitioned for unit of public employes."(*118*)

This decision seems open to question. If one guards premises, one guards them against all comers, employe and nonemploye. The occasion to guard against strikers is only during strikes; these may occur only once in five or six years. It would be surprising to see specific reference in job descriptions to labor unrest or employe property damage.

Certain employes have been held not to be guards: parking lot attendants(*119*); school bus monitors(*120*); communication

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118. Com. Perry S.D., 3 PPER 335, 337.

119. Allegheny Co., 4 PPER 28.

120. Harrisburg S.D., 5 PPER 28.

center operators(*121*); parking meter attendants(*122*); school crossing guards.(*123*)

An earlier *Ross Township* case, 2 PPER 139, raises a point commented on in later cases. In that case, school crossing guards were appointed under a special police statute.(*124*) The PLRB regarded them as police and subject to the police and firemen bargaining act, Act 111, 43 P.S. §217.1, et seq. As such, they were barred from inclusion in any PERA bargaining units. This proposition was rejected for school guards in the *Falls Twp.* case, **supra**. The issue is not dead. Changed conditions at schools or municipalities may cause "guards" to be "police" under Act 111, **supra**. The issue will be: Who are police and firemen? The section of this book dealing with Act 111, discusses this.

The first part of this section explains the reason for excluding "guards of persons and property" from units of other employes. The necessity of separate units also demands that the guard unit "not be affiliated with any other organization representing or including as members, persons outside of the organization's classification".(*125*) Simply stated, guards are to be represented by guards' unions, admitting only guards to membership. Note, however, that this limitation does not apply to the category of guards at prisons or mental hospitals.(*126*) Note also that individual guards may belong to nonguard unions so long as that union does not seek to represent the guard for collective bargaining.(*127*)

§4.11 Part-time Employes

When employes do not work a full workweek, the question arises whether they should be included in units with employes who do work full time. Generally the answer is "yes". Such

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121. **Clarion Co. Commissioners**, 6 PPER 304.

122. **Tyrone Boro.**, 6 PPER 304.

123. **Falls Twp. v. PLRB**, 5 PPER 14, 14 Pa. Cmwlth. 494, 322 A.2d 412 (1974); **Ross Twp.**, 6 PPER 140.

124. 53 P.S. §56, 414.

125. 43 P.S. §1101. 604 (3).

126. **Delaware County Prison Brd.**, 1 PPER 52; **Lehigh Co.**, 1 PPER 60; **Delaware Co.**, 3 PPER 361, 4 PPER 45; **Com. of Pa.**, 2 PPER 204.

127. **SEPTA**, 3 PPER 173.

person are employes and are thus covered by PERA.(*128*) The number of hours they work seems relevant only from the point of view of whether they are regular employes or not.

> "As a general rule, the board will include in the unit regular, part-time employes doing work similar to that of the full-time employes in the unit. The regularity of employment must exist with a fair degree of frequency and be distinguishable from casual employment to perform occasional jobs for temporary purposes where the hiring in each instant is a matter of special engagement."
> *West Branch Beef & Provision Co.*, PLRB, 244/1955.(*129*)

The Commonwealth Court has agreed with the PLRB without extended discussion.(*130*) Many cases mention regularity of employment for part-time workers.(*131*) Stipulations of parties agreeing to exclude regular part-time employes from units have been refused by the PLRB.(*132*) Generally, the PLRB will not exclude part-time employes from units of regular workers based upon a set number of hours worked per week.(*133*)

Regularity of employment has been held not interrupted by the summer absenses found in school districts.(*134*) It is not interrupted by the lapse between winter and summer sports programs for recreation leaders.(*135*)

Regularity of employment is the most important element constituting a community of interest of part-time workers with

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128. **Falls Township**, 3 PPER 77; **Lebanon S.D.**, 4 PPER 21.

129. **Northumberland Co.**, 2 PPER 189, 193.

130. **Falls Twp.**, 5 PPER 14; 14 Pa. Cmwlth. 494, 322 A.2d 412. (1974)

131. **Annville-Cleona S.D.**, 2 PPER 151; **Lackawanna Co.**, 3 PPER 266; **Memorial Hospital of Roxborough**, 3 PPER 306; **Good Samaritan Hospital**, 3 PPER 317; **Thomas Jefferson Hospital**, 3 PPER 347; **Albert Einstein Medical Center**, 4 PPER 42, (C.P., Phila.); affirmed 6 PPER 8, 17 Pa. Cmwlth. 91 330 A.2d 264 (1975); **Northeastern S.D.**, 5 PPER 34; **Bethlehem Area S.D.**, 5 PPER 41, **Radnor Twp. S.D.**, 6 PPER 30; **Altoona Parking Auth.**, 6 PPER 81; **Hershey Medical Center**, 6 PPER 191; **Bristol Boro. S.D.**, 6 PPER 276; **Easton Area S.D.**, 6 PPER 344.

132. **Commodore Perry S.D.**, 3 PPER 335; **Northumberland Co.**, 2 PPER 189, 193.

133. **Northumberland Co.**, 2 PPER 189, 193; **Unversity of Pennsylvania**, 3 PPER 243; **Radnor Twp.** S.D., 6 PPER 30. Contra, **Philipsburg-Osceola Area S.D.**, 1 PPER 47, 20 hours per week or more included in the unit, and less than 20, excluded from the unit.

134. **Chartiers Valley S.D.**, 3 PPER 246; **York Day Nursery and Kindergarten**, 3 PPER 101; **Bellefonte Area S.D.**, 3 PPER 60.

135. **City of Clairton**, 3 PPER 89.

full-time workers. However, it is not the sole factor constituting "community of interest".

> "Furthermore, other considerations that may be used to determine if employes are regular part-time employes are basically the same as those used to determine whether or not there is a community of interest in any proposed unit. These include: whether or not the employes are on a similar pay scale; whether or not the employes are under the same supervision; whether or not the employes receive the same fringe benefits; whether or not the employes perform similar duties; whether or not the employes have the same location of employment; whether or not the employes have the same terms and conditions of employment."(*136*)

In numerous cases, the PLRB refers to similarity of supervision, fringe benefits, skills, duties, pay scale, etc. between full-time and part-time employes as being reason to include both in the same unit.(*137*)

However, several cases state that differences in fringe benefits between full-time and part-time employes are not enough to cause exclusion of part timers from units of full-time employes.(*138*)

The PLRB has frequently referred to NLRB cases as a guide in inclusion or exclusion of part-time employes in full-time units.(*139*) Such decisions seem most helpful in the case of part-time workers. The PLRB has borrowed NLRB precedent to include Social Security pensioners in full-time units.(*140*)

§4.12 Casual and Temporary Employes

Another sort of part-time worker is a person called upon

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136. **Northumberland Co.**, 2 PPER 189, 193.

137. **Cheltenham Twp. S.D.**, 1 PPER 44; **Donegal S.D.**, 1 PPER 132; **Albert Einstein Med. Center**, 2 PPER 98, 99, C.P., Phila. Co., 4 PPER 42; 6 PPER 8, 17 Pa. Cmwlth. 91, 330 A.2d 264 (1975); **Northumberland Co.**, 2 PPER 189, 193; **Chartiers Valley S.D.**, 3 PPER 246; **Memorial Hospital of Roxborough**, 3 PPER 306; **Northeastern S.D.**, 5 PPER 34; **Bethlehem Area S.D.**, 5 PPER 41.

138. **Baldwin Whitehall S.D.**, 6 PPER 277; **Rose Tree-Media S.D.**, 5 PPER 102; **Bellefonte Area S.D.**, 3 PPER 60, 62.

139. **Falls Twp. v. PLRB**, 3 PPER 77; 5 PPER 14, 14 Pa. Cmwlth. 494, 322 A.2d 412; **Albert Einstein Med. Center**, 2 PPER 98, C.P. Phila. Co., 4 PPER 42; 6 PPER 8, 17 Pa. Cmwlth. 91, 330 A.2d 264 (1975); **Greene Co. Memorial Hospital**, 3 PPER 124.

140. **Northumberland Co.**, 3 PPER 69.

now and then to work, or called upon to work for a specified period but no longer. Such persons are generally excluded from units of full-time employes as they have such limited interest in the employment relationship. The gradation from temporary and casual employe, excluded from the unit, and the part-time employe, included in the unit is a shifting, uncertain thing. Clearly, sporadic workers are excluded from bargaining units.(*141*) The mere power to fire employes at will does not constitute such employes casual employes.(*142*)

On-call workers who respond only when bid to work are sometimes put in units, sometimes excluded. In *Northumberland Co.*, 3 PPER 69, on-call workers in Unit II were excluded, while on-call nurses aides in Unit V were included. The distinction, if any, was that the aides probably worked more hours. In *Altoona Parking Auth.*, 6 PPER 81 and in *Radnor Twp*. S.D., 6 PPER 30, the PLRB included on-call workers; in *Bradford Co.*, 3 PPER 267, 269, an on-call worker was excluded.

Temporary employes are generally those employes hired to complete particular tasks and with little expectation of continued employment beyond that task. What is temporary and excluded from bargaining units and what is included is as shifting a proposition as what is a casual worker. In *Wilson S.D.*, 1 PPER 55, the PLRB excluded a per diem worker who seemed assured of employment from November to the following May. In *E. Penn S.D.*, 6 PPER 18, the PLRB approved stipulations including in the unit, substitute teachers who could expect 90 days of employment. In *W. Jefferson S.D.*, 6 PPER 117, the board included teachers scheduled to work a semester, or those working day-to-day who had actually worked a semester in the full-time unit.

In *Northumberland Co.*, 3 PPER 69, 71, six tipstaffs with annual salaries and about 14 weeks work a year were excluded as temporary employes. Summer workers have been excluded from units.(*143*) Three employes hired under a federal grant scheduled to run out in one year were excluded from a unit as casuals.(*144*)

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141. Boro. of Bangor, 2 PPER 133.

142. City of Philadelphia, 6 PPER 345.

143. Cheltenham Twp. S.D., 1 PPER 44; South Whitehall Twp., 3 PPER 17; Lysock View Co. Home, 5 PPER 27.

144. Delaware Co., 6 PPER 203.

Until more PLRB case law develops, one confronted with questions involving temporary or casual employes would do well to consult NLRB precedent.

§5. Exclusions from Bargaining Units

§5.1 Introduction

As previously noted, not all employes are included in the definition "public employe". Some specific exlusions are "management level employes", and "confidential employes". These two categories of public employes are not afforded any bargaining rights by PERA. Students are not employes as was discussed under Section 2.2 Applicability - Public Employe. Independent contractors and their employes are generally not employes although the question of joint employment has arisen in some cases.

First level supervisors are not given the right to bargain under PERA but they are allowed "meet and discuss" privileges. This is different from federal practice where supervisors are excluded from bargaining units and from bargaining as completely as confidential or management level employes.

Exclusion of supervisors, confidential employes and management level employes is often the principal issue at PLRB representation hearings. Sometimes the employer will try to "pack the unit" with supervisors or confidentials whom it presumes will vote against the union. The union may try to include supervisors in the unit, because it feels they will vote for the union or because it knows that having persons of authority in the union will be advantageous to it in bargaining or administering the contract. Sometimes the union will try to enlarge a unit to include supervisors, confidential employes and management level employes merely to enlarge its dues base. Whatever the reason, exclusions are much disputed and deserve the somewhat extended treatment found in this chapter.

§5.2 Supervisors

§5.2.1 Conflicting Loyalties

Supervisors are representatives of management. They tell workers what to do, they scold them if they do not do their work, they plan the work and perform some or all of the myriad of duties necessary to do the job. There is necessarily a divergence of interests between the employe and the supervisor, as there is a divergence of interest between the boss and the employe. If the boss, in the person of a supervisor, is a member of the union, is he loyal to management or labor? Interests often coincide but they often conflict. If an employe is not doing his job, how much consideration should he receive from a supervisor who belongs to the same union?

The federal jurisdiction wrestled with this problem because the NLRA (the Wagner Act), Act of July 5, 1935, ch. 372, 49 Stat. 449, did not prohibit supervisors from bargaining. In the early years of that act, the NLRB declined to certify collective bargaining units of supervisors on policy grounds. This rule waivered and in *Packard Motor Car Co. v. NLRB,* 330 U.S. 485, 67 S. Ct. 789, 91 L. Ed 1040 (1946), the United States Supreme Court agreed with the new NLRB rule and approved bargaining units of supervisors. Justice Douglas wrote a classic dissent raising the problem of a supervisor being compelled to serve two masters — his employer and his union. In the NLMRA of 1947 (the Taft-Hartley Act), 29 USCA §152(3), the definition of "employe" excluded supervisors and effectively removed supervisors from the protection of the act. Thereafter, supervisors became management for all practical purposes.

PERA takes a middle ground between the Wagner Act and the Taft-Hartley Act. The definition of employe does not exclude supervisors(*1*) although "management level employes" are excluded. The definition of "management level

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1. 43 P.S. §1101.301 (2).

employes''(*2*) includes, among others, ''all employes above the first level of supervision''. Thus, such employes above the first level of supervision lack PERA's protection as employes. First level supervisors have such protection, but:

> ''Public employers shall not be required to bargain with units of first level supervisors or their representatives but shall be required to meet and discuss with first level supervisors or their representatives, on matters deemed to be bargainable for other public employes covered by this act.''(*3*)

''Meet and discuss'' is defined in Section 301(17), 43 P.S. §1101.301(17), and allows discussions with the supervisors, but final decision remains in the employer. ''Meet and discuss'' is analyzed in another section.

Note that ''first level supervisors'' may **not** be ''included with any other units of public employes but (PLRB) shall permit them to form their own separate homogenous units''.(*4*)

The PLRB has an excellent discussion of the status of first-level supervisors in *Upper Darby S.D.*, 1 PPER 85:

> ''The creation of this third category of personnel, neither rank and file nor management, enables the board to avoid one dilemma arising from the National Labor Relations Act, under which a finding of supervisory status mandates exclusion from all benefits of the statute. In view of the public policy of the federal statute (Section 2, 29 U.S.C.A. §152(2)), which is generally similar to that of Act 195, there is a tendency to resolve close cases in favor of non-supervisory status—i.e., the protection of the statute. Act 195 avoids this problem.
>
> In defining first-level supervisors as those performing supervisory functions at the ''lowest level,'' the Legislature must be deemed to have intended that the language be given its ordinary meaning (Statutory Construction Act, **supra**, §33) and be read so as to complement and aid in the effectuation of the entire act (**ibid.**, §52(2)). The ''lowest level'' of supervision is, commonly, that at which one of a group of employes, performing rank and file

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2. 43 P.S. §1101.301 (16).
3. 43 P.S. §1101.704.
4. 43 P.S. §1101.604 (5).

> functions as do his fellows, also is responsible for the performance of various leadership functions involving some exercise of discretion.
>
> The words "responsibility" and "effectively" in that subsection must be read in terms of "lowest level" activities. Obviously, at the lowest level of supervision one is not empowered to use his unfettered discretion in directing, adjusting grievances or carrying out or even recommending personnel actions; these are management decisions. Where, however, the leader's personnel recommendations are given serious consideration and accorded weight in management's decisions, he has supervisory status. The same is true where he has formal responsibility to assign work or to oversee the manner in which it is carried out, even though his decisions are appealable..."

Two excellent points are made: 1) first-level supervisors are not the same in the PLRB as in the NLRB and 2) as first-level supervisors, with qualified bargaining rights and protection of PERA, they need not be held to as stringent a test as supervisors under the federal law.

This is important for two reasons: 1) In a close election among rank and file employes, a supervisor may be excluded from the bargaining unit with the possible effect of tipping the vote for the union or for the employer, depending on how the supervisor would have voted; 2) If supervisors are kept out of the rank and file unit, they are generally more loyal to the employer and management maintains essential control over the direction of employes.

§5.2.2 Preliminary Rules

Before defining a supervisor and considering the factors that influence the PLRB in making its decisions thereon, several basic rules should be mentioned. The PLRB definition of supervisor is the controlling one. It is inappropriate to put an "expert" witness on the stand to give his opinion on supervisory status. The PLRB is fully capable of deciding this and needs only occasional help from the courts. Definitions of supervisors contained in other legislation do not control the PLRB determination.(*5*) In the cited case, the Public School

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5. N. Schuylkill S.D., 1 PPER 28.

Code's definition of supervisor was held irrelevant to the PLRB's determination. Similarly, it has been held that job titles assigned by employers have little or no weight in deciding supervisory status.(*6*)

The power to supervise employes is the important factor. "Whether or not they actually perform the acts that they are empowered to perform is not as important as whether they are authorized to perform them."(*7*)

In *AFSCME v. PLRB*, 6 PPER 181, 20 Pa. Cmwlth. 372, 342 A.2d 155 (1975) the Commonwealth Court considered a board decision in which some members of a supervisory job group did not perform as supervisors in accordance with their job descriptions, although other job group members were clearly supervisors. The court agreed with the board in upholding supervisory status:

> "...The union forcefully argues that the board erred in failing to consider the appropriateness of inclusion of (alleged supervisors) in a first level supervisory unit on a case-by-case basis. We agree with the board; however, this would be an impractical and overly burdensome procedure which would result in the board supplanting the duty of a public employer to insure that its employes are working within their job description."

Obviously, the court gave great weight to the job description as did the PLRB.(*8*) Nevertheless, where facts are disputed, the actual performance of supervisory duties evidences the true existence of the supervisor's power.(*9*)

How much time is devoted to supervisory work or nonsupervisory work is "relevant only where the supervisory duties are exceedingly minimal...."

> "We cannot emphasize too strongly that the board cannot and will not set quantitative standards for the determination of supervisory status."(*10*)

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6. Wilkes-Barre General Hosp., 3 PPER 30; Chambersburg Area S.D., 6 PPER 144, 146.

7. N. Schuylkill S.D., 1 PPER 28, Upper Dublin S.D., 1 PPER; 133 Bellefonte Area S.D., 3 PPER 60; contra, City of Jeanette, 2 PPER 214.

8. See Commonwealth of Pa., 4 PPER 149.

9. W. Chester Area S.D., 1 PPER 92.

10. Upper Darby S.D., 1 PPER 85 (1971). See also Haverford Twp. S.D., 1 PPER 18; Ephrata Area S.D., 1 PPER 25; Tyrone Area S.D., 1 PPER 45; Bethel Park S.D., 1 PPER 51.

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State and federal labor law both recognize that the indicia of supervisory status enumerated in the definition is in the disjunctive, not in the conjunctive.(*11*)

> "To be classified as a 'supervisor' not all of the elements specified in Section 301(6) supra, need to be established. Authority in the interest of the employer to perform any one of said functions, is sufficient, if the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment."(*12*)

§5.2.3 Definition

PERA defines supervisor as follows:

> "(6) 'Supervisor' means any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employes or responsibly to direct them or adjust their grievances; or **to a substantial degree** effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment."(*13*)

This definition follows the NLRB definition nearly word for word. However, the boldfaced phrase is not present in the federal definition.(*14*) It would seem that NLRB precedent would be helpful in defining PERA's term and PLRB has often referred to these NLRB cases.

The phrase "to a substantial degree" has been interpreted by one county court. In the *Matter of the Employes of Bermudian Springs School District*, 6 PPER 79, C.P., Adams Co.(1975), Judge MacPhail noted that no case had commented

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11. **Oregon Stevedoring Co.**, 162 NLRB 1272, 1274 (1967); **Warner Co. v. NLRB**, 365 F.2d 435 (CA-3, 1966); **West Penn Power Co. v. NLRB**, 337 F.2d 993 (CA-3, 1964); **NLRB v. Budd Mfg. Co.**, 169 F.2d 571 (CA-6, 1948), cert. denied 335 U.S. 908 (1949).

12. **City of McKeesport**, 2 PPER 69, 70. See also **City of Jeanette**, 2 PPER 214; **Bellefonte Area S.D.**, 3 PPER 60; **Troy Area S.D.**, 3 PPER 155; **N. Potter S.D.**, 6 PPER 224.

13. 43 P.S. §1101.301 (6), emphasis added.

14. 29 USCA §152 (11).

on the phrase. PLRB had urged that a supervisor's "power to effectively recommend" personnel action must be **controlling** to be a supervisory function. PLRB cited *Risdon Mfg. Co.*, 195 NLRB 109 (1972) for this principle. Judge MacPhail aptly observed as follows:

> "Our conclusion from reading all of the cases cited in the matter now before us is that an 'effective recommendation' means one that must be accepted as distinguished from a mere suggestion or an unsolicited comment. However, when the Legislature qualified 'effective recommendation' in Section 301(6) to mean a recommendation that is effective 'to a substantial degree,' then it seems to us that such a recommendation need not have 'controlling weight' and that such a recommendation need not be accepted necessarily, although it would receive careful consideration. We conclude that the board in the present case used an incorrect standard to determine whether the department heads, coaches and athletic director were supervisors."(*15*)

§5.2.4 Job Duties

The tendency of many attorneys is to take the bare PERA definition of supervisor and ask if alleged supervisors do these things. Rarely does one find a supervisor who can hire, fire, promote, layoff, etc., without looking to a union contract, employer policy, or higher supervision. Ticking off elements of the statutory definition is a surface analysis of work. PLRB has considered the more sophisticated aspects of the supervisory status and held that certain duties and chores are enough to constitute one a supervisor. These duties are enumerated below with case references for each category or classification of function. One observation is appropriate: most of these duties are derived from the statutory phrase — "responsibly to direct (employes)". All of the following job duties or responsibilities find an origin in some part of the definition.

§5.2.5 Evaluation

Evaluation of subordinates is recognized as a supervisory function that helps establish supervision as a fact. Following are categorized positions where this was a factor in holding employes to be supervisors.

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15. See **Unionville - Chadds Ford S.D.**, 1 PPER 49; **West Chester Area S.D.**, 1 PPER 92; **Bellefonte Area S.D.**, 3 PPER 60.

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This list of cases determined that department chairmen or department heads in schools may be supervisors:

Spring-Ford Area S.D., 1 PPER 2
Loyalsock Twp. S.D., 1 PPER 3
Chambersburg Area S.D., 1 PPER 9
Mechanicsburg Area S.D., 1 PPER 11
Central York S.D., 1 PPER 12
Shikellamy S.D., 1 PPER 15
New Oxford Area S.D., 1 PPER 15
Haverford Twp. S.D., 1 PPER 18
W. York Area S. D., 1 PPER 23
Ephrata Area S.D., 1 PPER 25
Avon Grove S.D., 1 PPER 26
N. Schuylkill S.D., 1 PPER 28
E. Pennsboro Area S.D., 1 PPER 30
Luzerne Co. Com. College, 1 PPER 30
Solanco S.D., 1 PPER 41
Warwick S.D., 1 PPER 43
Cheltenham Twp. S.D., 1 PPER 44
Unionville-Chadds Ford Area S.D., 1 PPER 49
Carlisle Area S.D., 1 PPER 50
Wilson S.D., 1 PPER 55
Williamsport Com. College, 1 PPER 57
Daniel Boone Area Bd. of S. Directors, 1 PPER 75
Penn Manor S.D., 1 PPER 84
Bucks Co. Com. College, 1 PPER 91, citing *Long Island Univ.* 189 NLRB No. 109
Donegal S.D., 1 PPER 132
Upper Dublin S.D., 1 PPER 133
Littlestown Area S.D., 2 PPER 198
Wilkinsburg Boro. S.D., 5 PPER 9
Lower Dauphin S.D., 5 PPER 29
E. Lancaster Co. S.D., 1 PPER 105
Reading S.D., 1 PPER 117
Chambersburg Area S.D. 7 PPER 184

These cases dealt with head teachers or elementary school principals as supervisors:

New Oxford Area S.D., 1 PPER 15
N. Schuylkill S.D., 1 PPER 28
Littlestown Area S.D., 2 PPER 198
Chambersburg Area S.D., 7 PPER 184

Other categories that were considered supervisors are illustrated in these cases:

W. York Area S.D., 1 PPER 23, reading supervisor, head librarian and chairman health dept.
Big Spring S.D., 1 PPER 6, athletic director
Aliquippa Area S.D., 1 PPER 39, psychologist
Solanco S.D., 1 PPER 41, coordinators
Carlisle Area S.D., 1 PPER 50, reading consultants
McKeesport Hospital, 1 PPER 127, assistant head nurse
St. Joseph's Hospital, 2 PPER 24, head nurses
Pittsburgh S.D., 3 PPER 5, personnel assistants

Bellefonte Area S.D., 3 PPER 60

Montgomery Co., 3 PPER 83, social worker supervisors

N. Tioga S.D., 3 PPER 107, head custodians

York Co., 3 PPER 378, dietary supervisor

Luzerne Co. Com. College, 4 PPER 30, union contract specified system of evaluation

Temple Univ. Hos., 5 PPER 37, assistant head nurse

Bethlehem Area S.D., 5 PPER 41, cafeteria managers

Cumberland Co. Prison Board, 6 PPER 156

Pa. Turnpike Com., 6 PPER 272, maintenance supervisors

Com. of Pa., 7 PPER 140, police officer II

Just how much control a person must have over personnel decisions to be a supervisor is unique in public sector cases where statutes or regulations may assign ultimate power to hire or fire, etc. The PLRB has recognized this additional factor and nevertheless found supervisory authority.(*16*)

> "The fact that the power to hire, fire, suspend, promote and demote is not vested solely in the head custodians does not diminish their supervisory status since they 'to a substantial degree effectively recommend such action' within the meaning of the act."(*17*)

This conclusion is further justified by the fact that the immediate supervisor is the first to note improper behavior, superior work and so forth. He carries the word to the school board or other authority for action. If he does nothing, the authority that is required to make personnel changes will likely never act. Practically, the person who does or doesn't start the ball rolling holds the key to any personnel action.

This logic is ignored in a number of cases where the PLRB has found persons not to be supervisors because their recommendations are "not controlling". The board cites *North Hills S.D.*, Case No. PERA-R-757W (1972) as initial authority for this idea:

> "To find that an individual has the power of effective recommendation it is necessary to establish that his recommendation has controlling weight and is acted upon without an independent investigation by the person to whom the recommendation is made."(*18*)

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16. Bethlehem Area S.D., 5 PPER 41.

17. Bellefonte Area S.D., 3 PPER 60.

18. From Altoona Area S.D., 3 PPER 97.

This quote seems to have been borrowed from *Risdon Mfg. Co.*, 195 NLRB 109 (1972), and *Oregon Teamsters Security Plan Office*, 119 NLRB 207.(*19*)

In *Lehigh Co. Com. College*, 4 PPER 78, the board expands a trifle on its ideas as follows:

> "If the recommendor had absolute power over his recommendation, then there would be no reason for recommendee to exist. Controlling weight simply means that other than extraordinary or unusual circumstances, that the judgment of the recommendor will be followed."

The holdings in these cases are rather heavy handed and seem to have the effect of converting the statutory phrase "to a substantial degree effectively recommend" personnel action to "to a controlling degree recommend". Judge MacPhail's comments on the subject in *Bermudian Springs S.D.*, **supra**, seem a more logical approach to the problem.

Closely related to the idea that a supervisor's recommendations are merely advisory and not controlling is the PLRB's tendency to categorize asserted supervisory duties as merely liaison between administration and employes. In some cases, the board has agreed that liaison is a supervisory function.(*20*) In other cases, the board has said such supervisors are mere conduits and have no supervisory power.(*21*)

In deciding how effective a recommendation is, one must be mindful of the disciplines involved:

> "Those in the hierarchy of organization (the generalist) whether they like it or not must rely on those with expertise in a given area (the specialist). There is no

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19. **See also Council Rock S.D.**, 3 PEPR 303; **Altoona Area S.D.**, C.P., Blair Co., 6 PPER 1; **Lancaster Co. Commissioners**, C.P., Lancaster Co., 3 PPER 208; **Karns City Area S.D.**, 3 PPER 273; **Zerbe Twp.**, 5 PPER 49; **City of Erie**, 5 PPER 4 and 6 PPER 17; **Scranton S.D.**, 6 PPER 91; **Jersey Shore Area S.D.**, 6 PPER 137; **City of Altoona**, 3 PPER 188.

20. **Manheim Central S.D.**, 1 PPER 10, head teacher; **Dover Area S.D.**, 1 PPER 16, head teacher; **W. York Area S.D.**, 1 PPER 23, reading supervisor; **Tyrone Area S.D.**, 1 PPER 45, athletic director.

21. **Montgomery Area S.D.**, 1 PPER 43, department heads; **Penn-Cambria S.D.**, 1 PPER 76, building heads; **Keystone Oaks S.D.**, 1 PPER 87, department chairmen; **Behtlehem Center S.D.**, 1 PPER 134; **Philipsburg-Oscoela S.D.**, 2 PPER 95, administrative assistant to superintendent; **E. Penn S.D.**, 3 PPER 304; **Lebanon S.D.**, 3 PPER 333; **Phila. S.D.**, 4 PPER 128, research associates; **Lackawanna Co.**, 5 PPER 92.

sensible way a science teacher can be rated without the report of the head of the Science Department."(*22*)

Periodic evaluation of tenured and nontenured teachers is required in Pennsylvania. The persons making these evaluations would seem automatically supervisors. However, if the evaluations serve no purpose, they aid little in establishing supervisory status and in cases where the use of evaluations was not shown, the board has decided against supervisory status.(*23*)

§5.2.6 Assigning and Directing Work of Subordinates

Making work assignments, counseling and guiding employes in the performance of work and ascertaining whether work is completed is a supervisory function and is another indicator as to whether job duties constitute supervision in fact. This may include assigning overtime, telling employes when they may take time off and scheduling vacations.

This list of cases determined that department chairmen or heads in schools may be supervisors on the basis of this factor:

Spring-Ford Area S.D., 1 PPER 2
Loyalsock Twp. S.D., 1 PPER 3
Chambersburg Area S.D., 1 PPER 9
Central York S.D., 1 PPER 12
W. York S.D., 1 PPER 23
W. Perry S.D., 1 PPER 24
N. Schuylkill SD., 1 PPER 28
E. Pennsboro Area S.D., 1 PPER 30
Solanco S.D., 1 PPER 41
Cheltenham Twp. S.D., 1 PPER 44
Unionville-Chadds Ford Area S.D., 1 PPER 49
Carlisle Area S.D., 1 PPER 50
Wilson S.D., 1 PPER 55
Daniel Boone Bd. of Sch. Directors, 1 PPER 75
Elizabethtown Area S.D., 1 PPER 77
E. Lancaster Co. S.D., 1 PPER 105
Tamaqua Area S.D., 1 PPER 107
Marple Newtown S.D., 1 PPER 110
Lower Moreland Twp. S.D., 1 PPER 120
Montgomery Area S.D., 1 PPER 43
Donegal S.D., 1 PPER 132
Wilkinsburg Boro. S.D., 5 PPER 9

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22. Wilson S.D., 1 PPER 55. See also Spring-Ford Area S.D., 1 PPER 2; Ephrata Area S.D., 1 PPER 25; Luzerne Co. Com. College, 1 PPER 30; Solanco S.D., 1 PPER 41; Unionville-Chadds Ford S.D., 1 PPER 49.

23. Hazelton Area S.D., 1 PPER 27; West Chester Area S.D., 1 PPER 92.

This list of cases determined that various other job titles could, in fact, be supervisors on the basis of assigning and directing the work effort of others:

Big Spring S.D., 1 PPER 6, director of athletics and elementary school principal
City of Erie S.D., 1 PPER 5, project supervisor
Chambersburg Area S.D., 1 PPER 9, teaching principal
W. York S.D., 1 PPER 23, athletic director, head librarian
W. Perry S.D., 1 PPER 24, head teachers, athletic director
N. Schuylkill S.D., 1 PPER 28, elementary head teachers and subject chairman
Keystone Central S.D., 1 PPER 40, head teachers
Solanco S.D., 1 PPER 41, coordinators and athletic directors
Tyrone Area S.D., 1 PPER 45, athletic director and elementary building principal
Carlisle Area S.D., 1 PPER 50, reading consultant
Wilson S.D., 1 PPER 55, athletic director
Williamsport Com. Col., 1 PPER 57, one man department, not supervisor
Elizabethtown Area S.D., 1 PPER 77, subject chairman
City of Allentown, 1 PPER 82, head and assistant custodians not supervisors
McKeesport Hospital, 1 PPER 127, assistant head nurse
Manheim Central S.D., 1 PPER 10, head teacher
Dover Area S.D., 1 PPER 16, head teacher
W. Shore Area S.D., 1 PPER 17, institutional coordinators
E. Lancaster Area S.D., 1 PPER 105, extra curricular activities heads
Donegal S.D., 1 PPER 132, athletic director
St. Joseph's Hosp., 2 PPER 24, head nurse
City of McKeesport, 2 PPER 69, clerical supervisors
Moniteau S.D., 2 PPER 118, custodian supervisors
Charleroi-Monessen Hospital, 2 PPER 120, inhalation therapist who directs only one subordinate
Greensburg-Salem S.D., 3 PPER 37, cafeteria managers
Com. of Pennsylvania, 3 PPER 57, regional lottery managers
City of Erie, 3 PPER 58, office services manager
Bellefonte Area S.D., 3 PPER 60, head custodians
N. Penn Water Authority, 3 PPER 63, working foremen
W. Side Vocational Tech. S., 3 PPER 74, supervision of custodians
Muhlenberg Twp. S.D., 3 PPER 105, head custodians with no subordinates are not supervisors; other head custodians were supervisors
N. Tioga S.D., 3 PPER 107, head custodian, chief maintenance men
Troy Area S.D., 3 PPER 155, cafeteria managers and head custodian
Keystone Central S.D., 3 PPER 194, cafeteria managers, head custodians and head cooks
Plymouth Twp., 3 PPER 248, head bookkeeper, director of public works and recreation director
Forest Area S.D., 3 PPER 264, head cooks and chief custodians

Bradford Co., 3 PPER 267, probation officers, chief clerks, head cooks
Midd-West S.D., 3 PPER 297, head teachers
Warminster Twp. Mun. Auth., 3 PPER 299, sewer plant supervisors
York Co., 3 PPER 378, group leader, dietary leader and crafts supervisor
Philadelphia S.D., 4 PPER 128, computer instruction analyst and direct coordinator for teacher education
S. Huntingdon Co. S.D., 4 PPER 158, maintenance supervisor
S. Lehigh S.D., 5 PPER 11, head custodians
Pen Argyle Area S.D., 5 PPER 17, head cooks
Chestnut Ridge Area S.D., 5 PPER 23, head cook
Temple Univ. Hosp., 5 PPER 37, assistant head nurse
Bethlehem Area S.D., 5 PPER 41, cafeteria managers
Benton Area S.D., 6 PPER 48, cafeteria managers
N. Hills S.D., 6 PPER 36
Dauphin Co., 6 PPER 49, social workers
Hatboro-Horsham S.D., 6 PPER 121, cafeteria managers and head custodians
Chambersburg Area S.D., 6 PPER 144, head & assistant head custodians
First Judicial District, 6 PPER 150, assistant supervisors in courts
Cumberland Co. Prison Board, 6 PPER 156, prison sergeants & corporals
City of Altoona, 6 PPER 159, head secretary
York Co. Prison Bd., 6 PPER 174, supervisors on shifts
N. Potter S.D., 6 PPER 224, cafeteria managers
Pa. Turnpike Com., 6 PPER 272, maintenance supervisors
Claysburg-Kimmel S.D., 6 PPER 309, cafeteria managers and head custodians
Delaware Co., 6 PPER 337, prison corporals
Donegal S.D., 7 PPER 71
Boro. of Lansdale, 7 PPER 114, maintenance foreman
Com. of Pennsylvania, 7 PPER 140, police officer II
Albert Einstein Med. Center v. PLRB, ____ Pa. Cmwlth. ____, 374 A.2d 761 (1977), head nurses.

The PLRB has concluded in several cases that professional employes, particularly nurses, do not exercise independent judgement when they direct other nursing personnel. The logic seems to be that directing personnel "as part of a highly skilled calling on the one hand" and directing personnel as personnel administration are two different things.

> "They exercise such authority not because they are managerial employes, but because of their education and training as professionals."*(24)*

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24. Pittsburgh Hospital Association, 2 PPER 43, 44. See also Medical College of Pa., 4 PPER 83; Northampton Co. Home, 5 PPER 70; St. Joseph Hosp., 2 PPER 24.

A variation of this rule sprouts up when the board says persons are not supervisors because they are merely more experienced personnel directing less experienced personnel in their work.(*25*) In both instances, one is hard put to see the difference between a nurse telling an orderly how properly to lift a patient and a construction foreman telling a laborer how to put dry wall on the ceiling. Instruction is part of supervision; what difference if the knowledge to instruct comes from school or from working in a trade. The power to "direct" subordinates seems no different in a charge nurse than in a job foreman.

The board has made an apt observation concerning professional employes:

> "One would expect in an academic environment that power would be exercised as a last resort...among professional employes such as a college faculty, authority is well when exercised sparingly."(*26*)

The fact that school principals, college teachers and nursing supervisors fire, reprimand and suspend few persons comes from the fact that few in those professions need firing, reprimanding and suspending and not because there is no supervisors.

§5.2.7 Instruction of Employes

Instruction of other employes, as contrasted with nonemploye students, is a supervisory function akin to direction of workers which may be a factor in determining if supervision, if fact, does exist. Testing such student-employes obviously bears on the student-employe's employment status. The following cases note instruction as indicia of supervisory status.

Pittsburgh Hospitals, 2 PPER 213 and 245
Montgomery Co., 3 PPER 83
Pittsburgh S.D., 3 PPER 5

First Judicial District, 6 PPER 150
Yeadon Boro., 6 PPER 349

§5.2.8 Hiring or Firing, or Recommendations Thereof

The definition (5.2.3.) of supervisor makes an express mention of hiring or firing or making effective recommenda-

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25. Altoona Area S.D., 3 PPER 97.

26. Lehigh Co. Com. College, 4 PPER 78, 81.

tions concerning hiring and firing employes as being a supervisory attribute.

The following cases reflect this as criteria for establishing supervision in fact.

Department heads or department chairmen in schools:

Chambersburg Area S.D., 1 PPER 9
Loyalsock Twp. S.D., 1 PPER 3
Shikellamy S.D., 1 PPER 15
New Oxford S.D., 1 PPER 15
W. York Area S.D., 1 PPER 23
Ephrata Area S.D., 1 PPER 25
Avon Grove S.D., 1 PPER 26
E. Pennsboro Area S.D., 1 PPER 30
Solanco S.D., 1 PPER 41
Warwick S.D., 1 PPER 43
Cheltenham Twp. S.D., 1 PPER 44
Unionville-Cnadds Ford Area S.D., 1 PPER 49
Carlisle Area S.D., 1 PPER 50
Bethel Park S.D., 1 PPER 51
Wilson S.D., 1 PPER 55
Daniel Boone Bd. of S. Directors, 1 PPER 75
Elizabethtown Area S.D., 1 PPER 77
Penn Manor S.D., 1 PPER 84
Bucks Co. Com College, 1 PPER 91
Tamaqua Area S.D., 1 PPER 107
Marple-Newtown S.D., 1 PPER 110
Upper St. Clair S.D., 1 PPER 111
Reading S.D., 1 PPER 117
Lower Moreland Twp. S.D., 1 PPER 120
Donegal S.D., 1 PPER 132
Upper Dublin S.D., 1 PPER 133
Littlestown Area S.D., 2 PPER 198
Luzerne Co. Com. College, 4 PPER 30, department chairman did not recommend one employe, but groups of five
Lehigh Co. Com. College, 4 PPER 78
Lower Dauphin S.D., 5 PPER 29
Leechburg Area S.D., 5 PPER 83, distributes work to just one secretary
Rose Tree-Media S.D., 5 PPER 106, head custodians and head craftsmen
Chambersburg Area S.D., 7 PPER 184

The following cases illustrate this for other job titles:

Big Spring S.D., 1 PPER 6, elementary building principals
Chambersburg Area S.D., 1 PPER 9, teaching principals
Shikellamy S.D., 1 PPER 15, coordinators
New Oxford S.D., 1 PPER 15, athletic director, head teachers guidance directors
Dover Area S.D., 1 PPER 16, athletic directors, head teachers
W. Shore S.D., 1 PPER 17, instructional coordinator
W. York Area S.D., 1 PPER 23, reading supervisor, chairman of health department, athletic director

W. Perry S.D., 1 PPER 24, athletic director

Ephrata Area S.D., 1 PPER 25, subject chairman

Aliquippa Area S.D., 1 PPER 39, psychologist

Tyrone Area S.D., 1 PPER 45, athletic director

Carlisle Area S.D., 1 PPER 50, multimedia specialist

Wilson S.D., 1 PPER 55, athletic directors

Daniel Boone Bd. of S. Directors, 1 PPER 75, elementary building heads

Elizabethtown Area S.D., 1 PPER 77, subject chairmen, coordinators

McKeesport Hospital, 1 PPER 127, assistant head nurses

Donegal S.D., 1 PPER 132

Moniteau S.D., 2 PPER 118, custodian supervisor

Charleroi-Monessen Hosp., 2 PPER 120, inhalation therapist with only one subordinate

Pittsburgh S.D., 3 PPER 257, C.P. Allegheny Co., personnel assistants

Greensburg-Salem S.D., 3 PPER 37, cafeteria managers

Commonwealth, 3 PPER 57, regional lottery managers

City of Erie S.D., 3 PPER 58, office services supervisor

N. Penn Water Authority, 3 PPER 63, working foremen

W. Side Voc. Tech. S., 3 PPER 74

Montgomery Co., 3 PPER 83, social workers supervisors

Muhlenberg Twp. S.D., 3 PPER 105, some head custodians held supervisors, some rejected

N. Tioga S.D., 3 PPER 107, head custodians, chief maintenance men

Troy Area S.D., 3 PPER 155, head custodians and cafeteria managers

Keystone Central S.D., 3 PPER 194, cafeteria manager, head cook, head custodians

Temple Univ., 3 PPER 209, department chairmen

Plymouth Twp., 3 PPER 248, chief cooks and head custodians

York Co., 3 PPER 378, group leader

Com. of Pa. 4 PPER 44, special education teacher, minor time spent supervising

Wilkinsburg Boro. S.D., 5 PPER 9, art supervisors

S. Lehigh S.D., 5 PPER 11, head custodians

Pen Argyle, 5 PPER 17, head cooks

Chestnut Ridge Area S.D., 5 PPER 23

Huntingdon Area S.D., 5 PPER 33, head custodians

Northeastern S.D., 5 PPER 34, cafeteria managers

Bethlehem Area S.D., 5 PPER 41, cafeteria managers

Bensalem Twp., 5 PPER 58, building inspector

City of McKeesport, 5 PPER 63, various city administrators

Rose Tree-Media S.D., 5 PPER 106

Albert Einstein Med. Center, 6 PPER 8, 17 Pa. Cmwlth. 91, 330 A.2d 264 (1975)

N. Hills S.D., 6 PPER 36, instructional supervisor

Benton Area S.D., 6 PPER 78, cafeteria managers

Hatboro-Horsham S.D., 6 PPER 121, cafeteria managers and head custodians

First Judicial District, 6 PPER 150, assistant supervisors in courts

Cumberland Co. Prison Bd., 6 PPER 156, prison sergeants and corporals

York Co. Prison Bd., 6 PPER 174, shift supervisors

Delaware Co. Commissioners, 6 PPER 209, clerical supervisors

Yeadon Boro., 6 PPER 349, communications supervisor

Univ. of Pittsburgh, 7 PPER 21, 25, department chairmen

Donegal S.D., 7 PPER 71, head custodians

Com. of Pa., 7 PPER 140, police officer II

§5.2.9 Responsible for Subordinates' Activities

Where it is understood that an alleged supervisor is responsible for the activities of his subordinates, an indicia of supervisory status is present. This is reflected in the following cases:

Chambersburg Area S.D., 1 PPER 9, department heads

W. York S.D., 1 PPER 23, department chairman

Cheltenham Twp. S.D., 1 PPER 44, department heads

Wilson S.D., 1 PPER 55, athletic director

Penn-Cambria S.D., 1 PPER 76, building heads who report problems, but who did not reprimand

McKeesport Hospital, 1 PPER 127, assistant head nurse

Penn-Delco S.D., 1 PPER 135, librarian and aquatics instructor

Littlestown Area S.D., 2 PPER 198, head teacher

W. Perry S.D., 1 PPER 24, head teachers

Tamaqua Area S.D., 1 PPER 107, teaching principals and department chairmen

Forest Area S.D., 3 PPER 264, chief cooks and head custodian

Midd-West S.D., 3 PPER 297, head teachers

Pen Argyle Area S.D., 5 PPER 17, head cooks

Claysburg-Kimmel S.D., 6 PPER 309, head custodian

§5.2.10 Planning Course of Work

In school cases, the PLRB has held that planning curriculum and keeping study plans is part of supervisory duties. The planning of work for subordinates has been considered supervisory work in other cases. This is shown in the following list of cases.

Spring-Ford Area S.D., 1 PPER 2

Central York S.D., 1 PPER 12

Avon Grove S.D., 1 PPER 26

Solanco S.D., 1 PPER 41

Unionville-Chadds Ford Area S.D., 1 PPER 49

Bethel Park S.D., 1 PPER 51

Daniel Boone Bd. of S. Directors, 1 PPER 75

Penn Manor S.D., 1 PPER 84

Upper St. Clair S.D., 1 PPER 111

Lower Moreland Twp. S.D., 1 PPER 120

Donegal S.D., 1 PPER 132

Montgomery Co., 3 PPER 83

Wilkinsburg Boro. S.D., 5 PPER 9

Hatboro-Horsham S.D., 6 PPER 121

Claysburg-Kimmel S.D., 6 PPER 309

§5.2.11 Grievance Handling, Adjustment of Complaints

Adjustment of grievances, settlement of complaints and differences is frequently a supervisory chore and is indeed an indication of the fact that the person so charged is a supervisor. To constitute one a supervisor, the grievances need not be just those under the formal grievance system, but may include adjustment of differences or complaints that are not technically grievances.

Cases illustrating supervision because of function in the formal grievance system:

N. Schuylkill S.D., 1 PPER 28, department chairmen and subject area chairmen, elementary building head teachers

Lehigh Co. Com. College, 4 PPER 78, division chairmen

Lower Dauphin S.D., 5 PPER 29, department chairmen

Pa. Turnpike Com., 6 PPER 272, maintenance supervisors

Cases illustrating supervision based on function in noncontractual differences:

Chambersburg Area S.D., 1 PPER 9, teaching principals

W. Perry S.D., 1 PPER 24, athletic director

Hazelton Area S.D., 1 PPER 27, vice principals and assistant principals were held not supervisors; among other things they did not handle complaints

E. Pennsboro Area S.D., 1 PPER 30, department heads

Keystone Central S.D., 1 PPER 40, head teachers

Warwick S.D., 1 PPER 43, department heads

Elizabethtown Area S.D., 1 PPER 77, department directors, subject directors, coordinators

Tamaqua Area S.D., 1 PPER 107, department chairman

Lower Moreland Twp. S.D., 1 PPER 120, department chairmen

Donegal S.D., 1 PPER 132, department chairmen and athletic director

Montgomery Area S.D., 1 PPER 43, head elementary teachers

Warwick S.D., 1 PPER 43, department heads

Tyrone Area S.D., 1 PPER 45, elementary building principals

Daniel Boone Bd. of S. Directors, 1 PPER 75, department heads and elementary building heads

St. Joseph's Hospital, 2 PPER 24, head nurses

McKeesport City, 2 PPER 69, clerical supervisors

N. Potter S.D., 6 PPER 224, cafeteria managers

§5.2.12 Recommendations to Superiors about Management of Department or Enterprise

Persons expected to make recommendations regarding the organization and function of the employer have been held to be performing a supervisory function. This is illustrated by the following cases:

Spring-Ford Area S.D., 1 PPER 2
Mechanicsburg Area S.D., 1 PPER 11
Central York S.D., 1 PPER 12, recommend course changes, texts and building program
Solanco S.D., 1 PPER 41
Unionville-Chadds Ford Area S.D., 1 PPER 49
Carlisle Area S.D., 1 PPER 50
Wilson S.D., 1 PPER 55, athletic director
Williamsport Area S.D., 1 PPER 57
Daniel Boone Bd. of S. Directors, 1 PPER 75, department heads and elementary building heads
E. Lancaster Co. S.D., 1 PPER 105, extra curricular activity director
Upper St. Clair S.D., 1 PPER 111, curriculum leaders
Lower Moreland Twp. S.D., 1 PPER 120
Donegal S.D., 1 PPER 132
Upper Dublin S.D., 1 PPER 133
Plymouth Twp., 3 PPER 248, recreation director
Northeastern S.D., 5 PPER 34, cafeteria managers
Delaware Co., 6 PPER 337, prison corporals

§5.2.13 Departmental Meetings

One entrusted with responsibility to call and chair meetings of subordinates where work is discussed or planned is likely a supervisor. The following cases illustrate this principle:

Department heads and others in schools:

Spring-Ford Area S.D., 1 PPER 2
Loyalsock Twp. S.D., 1 PPER 3
Haverford Twp. S.D., 1 PPER 18
Central York S.D., 1 PPER 12
W. York S.D., 1 PPER 23
Ephrata Area S.D., 1 PPER 25, subject chairman
E. Pennsboro Area S.D., 1 PPER 30
Solanco S.D., 1 PPER 41
Unionville-Chadds Ford Area S.D., 1 PPER 49
Daniel Boone Bd. of S. Directors, 1 PPER 75
Penn Manor S.D., 1 PPER 84
Tamaqua Area S.D., 1 PPER 107
Reading S.D., 1 PPER 117
Donegal S.D., 1 PPER 132
Upper Dublin S.D., 1 PPER 133
Littlestown Area S.D., 2 PPER 198
Keystone Oaks S.D., 1 PPER 87, not supervisors as they had no independent discretion
Philipsburg-Oscela Area S.D., 2 PPER 95, academic principals

§5.2.14 Supervisory Meetings

Supervisory authority is indicated by compulsory attendance at supervisor's meetings. This is reflected in the following cases:

Loyalsock Twp. S.D., 1 PPER 3
Mechanicsburg S.D., 1 PPER 11
W. York S.D., 1 PPER 23
Cheltenham Twp. S.D., 1 PPER 44
Daniel Boone Bd. of S. Directors, 1 PPER 75
Marple-Newtown S.D., 1 PPER 110
Troy Area S.D., 3 PPER 155
First Judicial District, 6 PPER 150, assistant supervisors in courts
Pa. Turnpike Com., 6 PPER 272, maintenance supervisors

§5.2.15 Separate Offices

It is an indication of supervisory authority to have an office separate from one's subordinates. These cases illustrate such a principle:

Loyalsock Twp. S.D., 1 PPER 3
Marple-Newtown S.D., 1 PPER 110
Clayburg-Kimmel S.D., 6 PPER 309, head custodian
Yeadon Boro., 6 PPER 349, communications supervisor

§5.2.16 Physical Separation from Other Supervision

Where a school or other facility is separated from other facilities, and if a finding that the person in dispute is not a supervisor would result in there being no supervision in the school or facility, there is a strong presumption that he is a supervisor. This principle appears in these cases.

Head teachers or elementary building principals:

Montgomery Area S.D., 1 PPER 43
Tyrone Area S.D., 1 PPER 45
Daniel Boone Bd. of S. Directors, 1 PPER 75
Littlestown Area S.D., 2 PPER 198

§5.2.17 Additional Compensation

Supervisory status is indicated by the fact that the alleged supervisor is paid more than his subordinates. This principle is reflected in the following cases regarding department chairman of department head in schools:

Spring-Ford Area S.D., 1 PPER 2
Loyalsock Twp. S.D., 1 PPER 3

Chambersburg Area S.D., 1 PPER 9
Solanco S.D., 1 PPER 41
Warwick S.D., 1 PPER 43
Carlisle Area S.D., 1 PPER 50
Daniel Boone Area Bd. of S. Directors, 1 PPER 75
Penn Manor S.D., 1 PPER 84
Bucks Co. Com. College, 1 PPER 91
E. Lancaster Co. S.D., 1 PPER 105, $200 to $300
Tamaqua Area S.D., 1 PPER 107
Marple-Newtown S.D., 1 PPER 110, $800 to $1300
Reading S.D., 1 PPER 117
Lower Moreland Twp. S.D., 1 PPER 120
Donegal S.D., 1 PPER 132, $200 plus $50 per unit
Littlestown Area S.D., 2 PPER 198, $100
N. Tioga S.D., 3 PPER 107, head custodian, chief maintenance men
Troy Area S.D., 3 PPER 155, head custodians and cafeteria manager
Warminster Twp. Mun. Auth., 3 PPER 299
Temple Univ. Hosp., 5 PPER 37, assistant head nurse
Hatboro-Horsham S.D., 6 PPER 121, head custodians and cafeteria managers
Claysburg-Kimmel S.D., 6 PPER 303 cafeteria managers and head custodian

These cases illustrate this principle in other job titles:

Chambersburg Area S.D., 1 PPER 9, teaching principals
N. Schuylkill S.D., 1 PPER 28, director of special services and curriculum was not supervisor
Keystone Central S.D., 1 PPER 40, head teachers
Solanco S.D., 1 PPER 41, coordinator and athletic director
Montgomery Area S.D., 1 PPER 43, head elementary teachers
Daniel Boone Area Bd. of S. Directors, 1 PPER 75, elementary school building head $450
Elizabethtown Area S.D., 1 PPER 77, subject chairmen and coordinators
Bucks Co. Com. College, 1 PPER 91, area coordinators were not supervisors
E. Lancaster Co. S.D., 1 PPER 105, extra curricular activities heads $200 to $300
Upper St. Clair S.D., 1 PPER 111, 15% extra for curriculum leader
McKeesport Hospital, 1 PPER 127, assistant head nurse
First Judicial District, 6 PPER 150, assistant supervisors for courts

Boro. of Tyrone, 6 PPER 304, presents a strange holding. The board seems first to conclude that the employe in question possesses supervisory authority. It then steps back and says that since the supervisor gets only 36 cents an hour more than her subordinates, she is doing routine work that does not require independent judgment. The statute does not refer to supervisors being paid more money that their subordinates.

Usually this will be the case. However, if a person is a supervisor, he should not be denied that status because the PLRB thinks he should get more money.

§5.2.18 Management Type Chores, etc.

There are some chores that so partake of a management function that the PLRB has commented on them as indicia of supervisory status. Among these are initiation of vouchers, setting up athletic game schedules, writing contracts for school use and having been allowed extra time off from normal work to plan school schedules. The following cases illustrate this under various job titles:

W. York S.D., 1 PPER 23, athletic director

W. Perry S.D., 1 PPER 24, athletic director

Tyrone Area S.D., 1 PPER 45, athletic director

Daniel Boone Bd. of S. Directors, 1 PPER 75, department heads and elementary building heads

Donegal S.D., 1 PPER 132, athletic director

Philipsburg-Oscela Area S.D., 2 PPER 95, academic principals

N. Potter S.D., 6 PPER 224, cafeteria managers

Claysburg-Kimmel S.D., 6 PPER 309, cafeteria managers

Cases illustrating extra time off as a criteria:

Mechanicsburg Area S.D., 1 PPER 11, department chairmen

Solanco S.D., 1 PPER 41, department heads

Warwick S.D., 1 PPER 43, department heads

Cheltenham Twp. S.D., 1 PPER 44, department heads

Carlisle Area S.D., 1 PPER 50, department heads

Elizabethtown Area S.D., 1 PPER 77, department heads, subject directors, coordinators

Penn Manor S.D., 1 PPER 84, department chairmen

Upper Dublin S.D., 1 PPER 133, department chairmen

N. Tioga S.D., 3 PPER 107, order materials

Troy Area S.D., 3 PPER 155, cafeteria management head custodians

Eastern York S.D., 6 PPER 22, department heads, extra time not controlling to make department heads supervisors

Cases reflecting inventory control and/or budget preparation as criteria:

Manheim Central S.D., 1 PPER 10, head teachers

Central York S.D., 1 PPER 12, department chairmen trim teachers' requests to fit budget

W. York Area S.D., 1 PPER 23, reading supervisor, head librarian, chariman of health department, department chairmen.

W. Perry S.D., 1 PPER 24, athletic director

Ephrata Area S.D., 1 PPER 25, department and subject chairmen

Solanco S.D., 1 PPER 41, department heads

Cheltenham Twp. S.D., 1 PPER 44, department heads

Daniel Boone Bd. of S. Directors, 1 PPER 75, department heads

Upper St. Clair S.D., 1 PPER 111, curriculum leaders

Lower Moreland Twp. S.D., 1 PPER 120, department chairmen

Donegal S.D., 1 PPER 132, department chairmen

Forest Area S.D., 3 PPER 264, chief cooks

Hatboro-Horsham S.D., 6 PPER 121, head custodians

Pa. Turnpike Com., 6 PPER 272, maintenance supervisors

§5.2.19 Routine, Clerical Duties

The definition of supervisor contains the phrase:

> "...to a substantial degree effectively recommend such action (personnel changes cited in the definition), if in connection with the foregoing, the exercise of such authority is not merely **routine or clerical** in nature but calls for the use of independent judgment."*(27)*

With fair regularity, supervisory status is rejected because the asserted supervisor's duties are found to be "routine and/or clerical" and call for no "independent judgment". The bulk of the decisions mentioning routine or clerical duties have little discussion of the duties.

Columbia Boro. S.D., 1 PPER 120, department chairmen

Allegheny Co. Com. College, 2 PPER 114, department heads and division chairmen

Moniteau S.D., 2 PPER 118, kitchen managers

Huntingdon Area S.D., 4 PPER 159, head teachers

Other cases cite duties that the board has regarded as routine or clerical:

St. Joseph's Hosp., 2 PPER 24, ordering equipment or counting narcotics

Philipsburg-Osceola Area S.D., 2 PPER 95, answering phones, visitor service and distribution of forms

Albert Einstein Med. Center, 2 PPER 98, dispensing drugs

Plymouth Twp., 2 PPER 149, recordkeeping, checking out citizen complaints, minor law enforcement matters

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27. 43 P.S. §1101.301 (6), emphasis added.

Jeannette City, 2 PPER 214, technical testing, following instructions from a manual

Northumberland Co., 3 PPER 69, 72, audit accounts, check payroll

City of Lebanon, 3 PPER 285, routine direction of employes

Presbyterian Medical Center, 3 PPER 298, checks typing on labels, purchasing drugs, etc.

Lebanon S.D., 3 PPER 333, routine direction of employes like group leaders or team leaders

Thomas Jefferson University, 3 PPER 347, dispense drugs, prepare prescriptions

Episcopal Hospital, 3 PPER 375, 376, pharmacy work

Fayette Co. Housing Auth. 6 PPER 73, follow written policy, take tenant applications, report problems, make bank deposits

Green Co. Home, 6 PPER 55 (LPNs), look after patient needs, professionally direct aides

Somerset Co., 6 PPER 68, delegate work and see that it is done

Girard College, 6 PPER 225, safety and damage report

Boro. of Lincoln, 7 PPER 82, keeping work time

Lackawanna Transit System Auth., 7 PPER 126, dispatchers monitor performance of operators and make some changeovers

Wilson S.D., 1 PPER 55, department heads who assign, evaluate and interview teachers are not performing routine work

None of these cases really discuss or define what is routine or clerical. In some cases, the board is certainly correct in discounting the described work. In other cases, the board seems uncertain what to call the disputed duties and describes them as clerical or routine to bolster a nonsupervisory finding.

§5.3 Confidential Employes

§5.3.1 Background and Present State of the Law

Neither the *National Labor Relations Act* nor the *Pennsylvania Labor Relations Act* contain a definition or mention of confidential employes.(28) The concept grew up very early in the life of the *National Labor Relations Act* when the NLRB recognized the need for the employer to have persons who could conduct his labor relations in confidence.

> "We have previously expressed our awareness of the fact that in negotiating and in the settlement of grievances, the interests of a union and the management are ordinarily adverse. **Consequently, we have adhered to the opinion that the management should not be required to handle labor relations matters through employes who are repre-**

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28. 29 U.S.C.A. §141, et seq.; 43 P.S. §211.1 et seq.

> **sented by the union with which the company is required to deal and who in the normal performance of their duties may obtain advance information of the company's position with regard to contract negotiations, the disposition of grievances, or other labor relations matters.** Since the unit here sought is confided solely to employes of the aforementioned confidential type, we are of the opinion that the unit is inappropriate for the purposes of collective bargaining and, accordingly, that no question has arisen concerning the representation of employes of the company in an appropriate bargaining unit." (Emphasis added)(*29*)

The need for confidential status was such that although the law provided for no such exclusions from the bargaining unit, it was necessary for the national board to create one.

PERA has gone a step further and formalized the definition to be applied to confidential employes. Whereas both the NLRB and the PLRB could change, or conceivably eliminate, confidential employes under prior legislation, the PLRB has not such latitude under the *Pennsylvania Public Employe Relations Act.* It sould also be noted that the statutary definition of "confidential employe" does not appear to follow, other than in a general way, NLRB or PLRB definitions of "confidential employes", and so references to those definitions in aid of interpretation of the statute are of little help. On the contrary, the NLRB definition that the PLRB endeavored to adopt was contained in a case decided in 1956 and was rejected by the Commonwealth Court as inappropriate.

PLRB v. Altoona Area School District, 7 PPER 76, 23 Pa. Cmwlth 445, 352 A.2d 560 (1976) is the key case dealing with the definition of confidential employes. That case is now on appeal to the Pennsylvania Supreme Court. The lower court opinion of Judge Haberstroh of Blair County appears at 6 PPER 19. The PLRB nisi order appears at 3 PPER 85. The nisi order discussed several rules applied by the PLRB and rejected by the courts. A key mistake of the board is derived from this holding:

> The only remaining issue to be decided here is the confidential status of the eight secretaries. In the *West Shore School District* case, PERA-R-2366-C, and the *Churchill School District* case, PERA-R-1910-W, the board under-

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29. The Hoover Co., 55 NLRB 1321, 1323 (1944); see also Matter of Brooklyn Daily Eagle, 13 NLRB 974, (1939).

took to define a confidential employe. The board has definitively adopted the National Labor Relations Board's definition of confidential employe to the effect that no employe can be classified as confidential unless he or she is a secretary or aide to a principal managerial employe engaged in formulating or carrying out major labor relations policy and that such managing did not include first level supervisors because they handled grievances at the first level. (*30*)

In *West Shore S.D.*, 3 PPER 1, 2, the board said:

> "The board has by now decided that what is needed here is a simple rule to which all parties can gear their bargaining pattern, and a rule which will serve and permit parties to develop management teams.
>
> We have come to appreciate the national board's ultimate wisdom in the definition expressed in that case, and we hereby adopt the policy expressed in *B.F. Goodrich* as our own definition of what constitutes a confidential employe within the meaning of Section 301(13)."

The board followed a similar course in *Churchill S.D.*, 2 PPER 26, and based its conclusion on NLRB precedent. The key NLRB cases from which the PLRB derived its definition are *Ford Motor Co.*, 66 NLRB 1217 and *B.F. Goodrich*, 115 NLRB 722. The PLRB definition is lifted verbatum from those cases.

What the PLRB ignores is that PERA contains its own definition of "confidential employe", different from the NLRB definition and stated by the Legislature long after the NLRB had set forth its definition. The PLRB cannot rewrite what the Legislature has promulgated and the Legislature has defined confidential employes as follows:

> "(13) 'Confidential employe' shall mean any employe who works: (i) in the personnel offices of a public employer and has access to information subject to use by the public employer in collective bargaining; or (ii) in a close continuing relationship with public officers or representatives associated with collective bargaining or behalf of the employer."(*31*)

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30. 3 PPER 86, emphasis added.

31. 43 P.S. §1101.301 (13).

The effect of the *West Shore* case was to add general confusion to a finding of confidentiality and specifically to amend (13) (ii) as follows:

> "...in a close continuing relationship with public officers or representatives (who formulate, determine, and effectuate management policies in the field of labor relations), substituted for the phrase 'associated with collective bargaining on behalf of the employer'."

A second matter of great importance dealt with by the Commonwealth Court in the *Altoona* case related to (13) (i). The PLRB had argued that since the union might be able to secure "information subject to use by the public employer in collective bargaining" by way of "Right-to-Know" legislation or by the Public School Code of 1949, or by using other union employes, the personnel office employes could not be regarded as having access to confidential information. This concept is also discussed in *Commodore Perry S.D.*, 3 PPER 335. The Commonwealth Court observed:

> Although this payroll clerk would appear to fall within the express definition of confidential employe as set forth in Section 301(13)(i) of Act 195, the PLRB held that she was not a confidential employe because much of the information to which she had access would otherwise be available to the public under the Right To Know Act and the Public School Code of 1949. These acts, however, do not control the application of the very clear provisions of Act 195. We believe, therefore, as did the court below, that the PLRB erred in ruling that the payroll clerk here involved was not a confidential employe under Act 195.(*32*)

There are other important issues considered in the *Altoona* case. However, since the statutory definition is controlling, it is appropriate to consider the statute in discussing the definition.

§5.3.2 Definition - "...in the personnel offices..." etc.

The statutory definition provides:

> (13) "Confidential employe" shall mean any employe who works: (i) **in the personnel offices of a public employer and has access to information subject to use by the public employer in collective bargaining**; or (ii) in a close continuing

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32. PLRB v. Altoona Area S.D., 7 PPER 76, 77, 23 Pa. Cmwlth. 445, 352 A.2d 560 (1976).

relationship with public officers or representatives associated with collective bargaining on behalf of the employer.

Following is a discussion of the first half of the definition, Section 301(13)(i).

An initial question arises concerning what is a "personnel office". Public employers may be quite small, like a borough with one office that accommodates clerks working in fiscal, personnel and general administrative chores. The board has held this entire group to be in a "personnel office".

> "The employes who work in the borough office are clearly covered by subsection (13)(i). The administrative operations of the borough are small in scale. Four employes plus the borough secretary constitute the entire administrative staff. While there is no "personnel office" as such, all administrative functions, including personnel functions, are handled in the borough office. Information and records of every kind are kept in the borough office and the employes of the general department who work in the borough office have access to everything. This would necessarily include information subject to use by the employer in collective bargaining."(*33*)

The school districts have more clerical employes scattered in a variety of buildings. Certainly, there is one office in a school district that may be regarded as a personnel office. The board seems to accept this proposition.(*34*)

The PLRB has gone a step further, perhaps too far, in concluding that school districts have but one personnel office.

> "The employer contends that because certain personnel records originate in the offices of the principals, assistant principals and administrative assistants, and copies thereof are kept in such offices when the originals are transmitted to the administrative offices where central records are kept, the offices of the principals, etc. constitute 'personnel offices' under subsection (13)(i). It is argued that the

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33. Boro. of Homestead, 2 PPER 14. See also Lackawanna Co., 2 PPER 147; Boro. of Tyrone, 6 PPER 304; Plymouth Twp., 3 PPER 248, secretary to twp. manager; Somerset Co. Area Vo-Tech Sch., 6 PPER 68; contra Boro. of Danville, 3 PPER 220.

34. Philadelphia S.D., 6 PPER 324.

> use of the plural 'offices' indicates an intention not to limit the employer to a central personnel office. This interpretation is not consistent with the meaning of the language of the act. An employer may well have several personnel offices for different groups of employes or where operations are conducted at different geographical locations distant from one another. What constitutes a 'personnel office' has been defined by common and widely accepted usage. It clearly connotes the collection and handling of central employe records. Inevitably, certain personnel records must originate in the operating units where the employes work. Only after such records are gathered together and compiled with regard to all of the employes do they provide information which becomes significant for collective bargaining purposes. None of the employes here in dispute works in the central administrative offices of the employer. They cannot, therefore, be deemed to be working in the personnel offices of the employer."*(35)*

The board's conclusion seems based on the idea that "personnel office" has been defined by common and widely accepted usage. The board cites no authority for this claim and there does not appear to be one. If one recognizes the employer's need to keep a lid on labor relations information, one could also see the need to keep a lid on at various locations where information is kept. No one can dispute that there are many "personnel offices" for the commonwealth government. There are doubtless several "personnel offices" for the Pennsylvania Department of Transportation and likely several for the Philadelphia and Pittsburgh school districts. The labor board has painted with too broad a brush when it says no principal's office can be considered a "personnel office".*(36)* The facts of the particular case must be examined to come to a conclusion of whether or not there is a "personnel office".

The second part of (13)(i) contemplates the confidential employe having "access to information subject to use by the public employer in collective bargaining".

There are numerous cases where the PLRB found confidential status for employes with access to data used in

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35. **Churchill S.D.**, 2 PPER 26; See also **Union Area S.D.**, 3 PPER 231, 232 **Charleroi-Monessen Hosp.**, 2 PPER 120.

36. **W. Shore S.D.**, 3 PPER 1; **Altoona Area S.D.**, 3 PPER 85; **Clairton City S.D.**, 3 PPER 134.

bargaining.(*37*) The PLRB has shown a marked reluctance to find employes confidential when some question may be raised as to the confidentiality of the data to which these employes have access. By its own invention, or by incorporation of NLRB pecedent, the PLRB has found no "access to information" in the following ways:

(1) The material is available to the public under "right-to-know" legislation or under the School Code. As anyone can get the information, it cannot be confidential.

(2) "Access" means having the confidential data actually crossing one's desk. Mere access is not enough to constitute access.

(3) The nature of information going across the employe's desk is not **sufficiently** confidential to make the employe confidential.

None of these cases seem well founded or consistent with the purpose of the exclusion for "confidential employes".

Following are cases where employes were held not confidential because the union could get the information by Right-to-Know legislation. The Right-to-Know argument surfaced early in the existence of PERA. The board rejected the argument as follows:

> Finally, the personnel payroll clerk has clearly been shown to work in the employer's personnel office and have access to information which would be of use to the employer in his negotiations. **It has been stressed by the union that, this being a public institution, auditors or other members of the general public operating through proper channels can gain access to the same information concerned herein.** The crux of the matter, however, is the facility with which the personnel payroll clerk can obtain almost any personnel information. Her ready access to this information is directly attributable to the position she holds and the trust and confidentiality she shares with her employer thereby. This is the type of relationship that will be preserved and protected by excluding the personnel payroll clerk from the unit.
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> A final individual subjected to the employer's challenge upon the basis of confidentiality is the general accountant-

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37. Somerset Co. Area Vo-Tech Sch., 6 PPER 68; Boro. of Homestead, 2 PPER 14; Plymouth Twp., 3 PPER 248; Shaler Area S.D., 3 PPER 294.

> bursar. Here again we have an individual who has **ready access** to financial information which will be critical in the bargaining process. **While all of this information is obtainable by the public due to this being a public institution, only this individual has such ready access and grasp of this information.** The reason he has such control over this information is because the employer has placed him in this position and the employer will no doubt count upon this financial officer to advise in the bargaining process. Under such circumstances it would be unfair to the employer to have the general accountant-bursar as a member of the bargaining unit. He is, we believe, a confidential employe and should not be permitted to participate in the unit.(*38*)

In *Lebanon S.D.*, 3 PPER 333, the labor board did a complete reversal:

> "We must first say that access to payroll information does not make an employe confidential within the meaning of act since much of the information in the payroll is public in nature, and, under the Right to Know legislation, would be available to any citizen of the commonwealth and therefore cannot constitute confidential information within the meaning of the act."

This was immediately followed by *Commodore Perry S.D.*, 3 PPER 335 and the following:

> "Much of the information which crosses the desk of all three secretaries is not confidential in nature but rather would be considered public information, since the public would also have access thereto under the provisions of Right to Know legislation. We cannot, on such a basis, find that these employes are confidential within the meaning of the act, where, in many instances, the public would have the right to examine and read all matters which concern us here."

This rule has been applied in other cases.(*39*)

The Right-to-Know argument was used in the *Altoona* case

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38. Luzerne Co. Com. College, 2 PPER 161, 163, emphasis added.

39. W. Jefferson Hills S.D., 5 PPER 65; City of Erie, 6 PPER 17; Shaler Area S.D., 7 PPER 159 (clerk calculated cost of union demands and school proposals); City of Altoona, 6 PPER 159 (secretary to controller supplying information to bargainers).

and was rejected by the Commonwealth Court, 7 PPER 76, 23 Pa. Cmwlth. 445, 352 A.2d 560 (1976).

> Although this payroll clerk would appear to fall within the express definition of confidential employe as set forth in Section 301 (i) of Act 195, the PLRB held that she was not a confidential employe because much of the information to which she had access would otherwise be available to the public under the Right to Know Act and the Public School Code of 1949. These acts, however, do not control the application of the very clear provisions of Act 195. We believe, therefore, as did the court below, that the PLRB erred in ruling that the payroll clerk here involved was not a confidential employe under Act 195.

The rejection seems quite proper for the reason stated by Judge Blatt and for the following additional reasons:

1) It is by no means certain that unions can compel employers to disclose as much data as the PLRB would assume. An examination of the relevant statutes shows that disclosure is not all inclusive.

2) Compulsion to disclose data has never defeated the federal finding of confidentiality, though the union can make a private sector employer produce considerable private business information.*(40)*

3) The PLRB's early recognition of **ready, facile access**, of confidential employes to employer information is most important. If the union has a personnel office statistician as a member, why not make her the union statistician. She will know every move the employer makes and every record he keeps.*(41)*

The labor board has also confused the definition of confidential employe by requiring that employes not only had "access" but **work** with the confidential material. This idea first surfaced in *Churchill Area S.D.*, 2 PPER 26, 28, in a quotation from *CCH Labor Law Reporter* dealing with federal law:

"In order for employes to be considered as confidential,

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40. **Rangaire Corp.**, 157 NLRB 682, 1966 CCH-NLRB ¶20, 274; **Whiten Machine Works**, 217 F.2d 593, 27 LC ¶68,862 (1954); **Curtiss-Wright Corp. v. NLRB**, 347 F.2d 61, 69 (CA-3, 1965).

41. **Luzerne Co. Com. College**, 2 PPER 161, 163.

> they must have access to the confidential matters as a part of their regular duties. If they acquire the information in an offhand manner, they are not confidential employes...."

In *Leechburg Area S.D.*, 5 PPER 83, the board said:

> "The mere fact of access to confidential information does not make her a confidential employe;...."

Note, this was a federal rule. The PLRB has followed it with enthusiasm surpassing the NLRB.*(42)*

Blackhawk S.D., 4 PPER 76 states:

> "The fact that the structure of the secretarial pool in the central administration of the Blackhawk School District created the possibility of access to confidential data should not defeat the rights of employes under the ac when the record does not show that these employes have in fact worked with confidential data."

Several cases have noted that confidential material is or may be handled by employes claimed to be confidential. It adds insult to injury by finding these employes nonconfidential and by telling the employer to change his practice to keep confidential data out of their hands. In *Commodore Perry S.D.*, 3 PPER 335, 337, the PLRB stated:

> "One further question is deserving of mention. It was the testimony of Dr. Borowicz, that he employed his secretarial staff largely on an availability basis, as in the nature of a stenographic pool. **Although there has been this practice in this school district, we cannot allow such a situation to defeat the rights of employes that have been granted under the act. We therefore, under our decision fully expect that any confidential material which may have, although infrequently, crossed the desk of the remaining two employes, that such materials should be referred to the one confidential secretary that we have identified herein."** Emphasis added.*(43)*

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42. Similar cases are **Commodore Perry S.D.**, 3 PPER 335, **Johnsonburg Area S.D.**, 3 PPER 190, **Freeport Area S.D.**, 5 PPER 20 (this case cites a specific NLRB precedent).

43. **See also Lebanon S.D.**, 3 PPER 333; **Moniteau S.D.**, 2 PPER 118, 119; **W. Shore S.D.**, 3 PPER 1; **Keystone Central S.D.**, 3 PPER 194, 195.

The cases are odd reversals of an exclusion created for the employer's protection. The PLRB seems intent upon changing the legislative exclusion in the interest of greater union membership.

In *Freeport Area S.D.*, 5 PPER 20, the board said:

> "It was shown that she has physical access to the superintendent's office in which collective bargaining material is filed. However, she has no reason to look at such material and such would actually be a usurpation of her function as an employe of the school district."

The board denies confidential status because an NLRB case said mere access was not enough for confidential status. It did not consider 1) the Pennsylvania statute or 2) the fact that someone who wanted to rifle the superintendent's file would not be too concerned with niceties of behavior.

The explicit trust placed in the employes here contrasts oddly with a statement in *Bellwood-Antis S.D.*, 6 PPER 65:

> "Although Miss Goss stated that she would never divulge the contents of any communications coming through her hands, to or from Dr. Burggeman it is not her intentions of good faith which is controlling in this matter, but rather the potential for doing same, which we must recognize."

The better approach to these matters would be to say that "access" to collective bargaining material is "access" and that the employe should be excluded from the bargaining units. Along with these rather peculiar rules, the PLRB has also stated the following:

> "There is no question that the subject individual has access to the type of information described in this section along with the type of relationship with employer's collective bargaining representatives that is contemplated therein. This individual has a unique access to and control of personnel and payroll records of the employer and as such she is invaluable to the employer in the collective bargaining area. This is clearly a case of a "confidential employe" whose exclusion from the unit is dictated by the act."(*44*)

The statement is short, sensible and true.

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44. W. Side Vo-Tech. Sch., 3 PPER 74.

The third factor used by the labor board to hold employes not confidential involved appraisal of the quality of material that the personnel department has access to. Unless the personnel data reaches a level deemed adequate by the labor board, the employes are not considered confidential, despite access to information in the personnel department. In the following cases, the quality of the accessible data, as it bore on collective bargaining, was considered.

West Jefferson Hills S.D., 5 PPER 65 held:

> "The board has ruled on many occasions that the collective bargaining information must be of such a definite nature that the union would know of the employer's plans, if said information is revealed. Statistics from the files of the employer are a matter of public information, which any taxpayer has a right to know. It is only when these statistics are placed in some sort of a plan or proposal that one would have collective bargaining information."(*45*)

Following are cases that seem to call for a confidential status but the PLRB denied it: *Tamaqua Area S.D.*, 6 PPER 151, data processing supervisor computed cost of various monetary proposals, had access to budget before publication; clerks have access to confidential material used in bargaining, prepare negotiating material, can see salary schedules, records and employe evaluations. The board said this material "is not closely associated with the formulation, determination or effectuation of management policies in the field of labor relations." A like holding as to the secretary to the business manager appeared in *Clairton City S.D.*, 3 PPER 134, 136. *City of Altoona*, 6 PPER 159, secretary to city controller prepared statistical data used in bargaining, held not confidential.

In *Pottsgrove S.D.*, 6 PPER 334, various clerical employes in the administrative (personnel) office are deemed not confidential because they do not work on confidential papers; no consideration is given to access to such papers. In *Clarion Students Association*, 6 PPER 342, the PLRB referred to the bookkeeper as follows:

> "(She) does have certain personnel information, especially in relation to salaries, she is not present during confidential discussions of salaries nor does she have any

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45. See also Clairton City S.D.,3 PPER 134; Charleroi-Monessen Hosp., 2 PPER 120.

> input into the same. Again, the usual indicia of confidentially is lacking."

Pottsgrove S.D., 6 PPER 334, secretary-receptionist performing general secretarial functions in whole administrative office, typing minutes for negotiations; bookkeeper "not formulat[ing] the employer's financial policy although she may provide information which could be used by the employer in that capacity."

Employes in these cases are assembling data used by the employer, or summaries and impressions of bargaining sessions, or can easily put their hands on data used in bargaining. Although their situation seems to cry out for confidential status, it was denied them.

§5.3.3 Definition- "...in a close continuing relationship...", etc.

> "...in a close continuing relationship with public officers or representatives associated with collective bargaining...."

The second part of the definition of confidential employes is directed at an employe who works "in a close continuing relationship with public officers or representatives associated with collective bargaining on behalf of the employer".(*46*) The first question is what employes are regarded as working in a close continuing relationship with the described public officials. The second question relates to who will be regarded as "associated with collective bargaining". Both questions are answered in the following examples: *Tyrone Area S.D.*, 1 PPER 45, attendance officer serving as secretary of the administrative council; *Lackawanna Co.,* 2 PPER 147, clerk to director; *Luzerne Co. Com. College*, 2 PPER 161:

> "As applied to the position of executive secretary to the president of the college, this definition would, in the board's opinion, require this secretary to be excluded from the unit. The union has urged that this individual not be excluded since the president did not participate in recent negotiations between the employer and the professional employes of the college and since this employe did not have knowing access to or contact with the negotiations or confidential information relevant

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46. 43 P.S. §1101.301 (13).

> thereto. With this contention we cannot agree. The relationship between the president and his private secretary is a very personal one and undoubtedly one which would deemed "a close continuing" one under the act. The potential for the president being within the class of "public officers or representatives associated with collective bargaining" seems manifest as well. While the president may not be part of the actual negotiation team, it is certain that he will be called upon to play some part in the negotiating process. In so doing the prospect that he will call upon his secretary to correspond or phone for him, or merely make a confidential appointment is great. This prospect stems from the confidential and close relationship between this official and his secretary, and it is this relationship which dictates that the board exclude the principal secretary to the president of the college from the bargaining unit.
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> An even stronger case has been made for excluding the principal secretary to the director of business and finance. The director of business and finance is a member of the actual negotiating team and, as such, deserves maximum insulation regarding his negotiation activities. This cannot be provided if his personal secretary is a member of the labor organization and operating under the motivation of clearly conflicting interest."

In *Scranton-Lackawanna Human Development Agency, Inc.*, 2 PPER 174, secretaries to controller, director and to neighborhood youth corporation department are confidential employes.

> "The director, almost by definition, will play a significant role in behalf of the employer in the collective bargaining process."

City of Erie, 3 PPER 58, secretary to the director of vocational education having resource data for grievance resolution and negotiations. *Cambria County*, 3 PPER 115, secretary to the president judge. *Northampton Co.*, 3 PPER 128:

> "Obviously the head of the agency would be involved in any process of collective bargaining and for that reason the act wisely prohibits employes who stand in a close continuing relationship to her from being included in the bargaining unit."

Gateway S.D., 3 PPER 185, secretaries to bargainers; *Shaler Area S.D.*, 3 PPER 294, secretaries to bargainers and bargaining team; *City of Duquesne*, 4 PPER 150, city clerk is bargainer, secretary to the mayor is not confidential as the mayor does no bargaining; *Scranton S.D.*, 4 PPER 75, secretaries to directors of elementary and secondary education; *Lehigh Co. Com. College*, 4 PPER 78, 82, secretary to business services; *Pen Argyle A.S.D.*, 5 PPER 17, secretary to superintendent; *McKeesport Area S.D.*, 5 PPER 19, clerk handling hospitalization, life insurance, professional payrolls and who prepares salary and hospitalization projections for bargaining; *Marion Center Area S.D.*, 5 PPER 42, secretary to consultant to negotiator; *Bensalem Twp.*, 5 PPER 58, administrative assistant to township manager; *City of McKeesport,* 5 PPER 63, secretaries to city councilmen, treasurer, solicitor and police, also deputy comptroller; *Berks Area Reading Transportation Auth.*, 5 PPER 102, secretary to comptroller; *Somerset Co. Area Vo-Tech Sch.*, 6 PPER 68, secretaries to bargainers; *City of McKeesport*, 6 PPER 75, city clerk; *Delaware Co.*, 6 PPER 209, clerk to personnel coordinator; *Boro. of Tyrone*, 6 PPER 304, borough secretary and police clerk who work for bargainers; *City of Philadelphia*, 6 PPER 345, 347, finance officer who determines wage fund available; *PLRB v. Altoona Area S.D.*, 7 PPER 76, 23 Pa. Cmwlth. 445, 352 A.2d 560, secretaries to principals and Payroll Clerk; *York Co.*, 7 PPER 105, secretary to recorder of deeds; *Boro of Lansdale*, 7 PPER 114, police matron, senior payroll clerk, (switchboard operators were not confidential); *City of Williamsport,* 7 PPER 144, co. and assistant co. solicitor; *Armstrong S.D.*, 7 PPER 184, computer program; *Mid-Valley S.D.*, 8 PPER 133, secretaries to principals; *SEPTA*, 7 PPER 225, secretary to superintendent; *Upper Merion A.S.D.*, 8 PPER 83, secretaries to principals and payroll clerk.

§5.3.4 Barred to First Level Supervisors

West Shore S.D., 3 PPER 1, 2, contains the following proposition: 1) first level supervisors are authorized to "meet and discuss", 2) they could be represented by the same representative as the professional employes unit and, 3) they have a financial interest in the "professionals" bargaining. Therefore, if the first level supervisors can be represented and "meet and discuss" it is not logical to deny bargaining to their secretaries though they may qualify as confidential employes.

This concept was used in the following cases: *Clairton City*

S.D., 3 PPER 134, "Secondly, the principal at the high school is a first level supervisor and cannot have a confidential employe as we stated in *West Shore....*"; *Shaler Area S.D.*, 3 PPER 294; *Altoona Area S.D.*, 3 PPER 85; *Lebanon S.D.*, 3 PPER 333; *Cumberland Valley S.D.*, 3 PPER 348; *S. Huntingdon Co. S.D.*, 4 PPER 158; *Northeastern S.D.*, 5 PPER 34, 35; *Marion Center Area S.D.*, 5 PPER 42; *Leechburg Area S.D.*, 5 PPER 83; *Harrisburg S.D.*, 5 PPER 103. These cases have major faults: 1) if the facts justify confidential status for the secretary, why is her boss not also confidential **and** a first level supervisor and 2) the PLRB cases assume with no particular inquiry that the first level supervisors are only that, and not "management level employes" who cannot engage in bargaining or "meet and discuss".

The PLRB does not seem to like "confidential employes" and has jumped too quickly at chances to deny the status. Recent cases, guided by the ruling in *Altoona Area School District*, **supra**, have shown a needed balance.

§5.4 Management Level Employes

§5.4.1 General

"Management level employes" are defined in PERA as follows:

> "(16) 'Mangement level employe' means any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employes above the first level of supervision."(*47*)

Under PERA one of three conditions must be met to be "management level":

1. Be directly involved in determination of policy, or
2. Responsibly direct the implementation of policy, or
3. Be above the first level of supervision.

Under the NLMRA, there was no formal definition of "management employe", but like confidential employes, the NLRB early recognized that there was a group of employes whose interests were so akin to those of management that

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47. 43 P.S. §1101.301 (16).

practicalities mandated their exclusion from any unit of rank-and-file workers. NLRB "managerial employes" were described as follows in an early NLRB case:

> "We have customarily excluded from bargaining units of rank-and-file workers executive employes who are in a position to formulate, determine and effectuate management policies. These employes we have considered and still deem to be 'managerial' in that they express and make operative the decisions of management."*(48)*

Since there was not an express definition in the statute the NLRB felt at liberty to change the definition over the years. In *NLRB v. Bell Aerospace Co., Textron, Inc.*, 73 LC¶14,465, 416 U.S. 267, 94 Sup. Ct. 1757, 40 L.Ed.2d 134 (1974) the U.S. Supreme Court limited the extent to which the NLRB could tinker with a concept that it had honored for so long. That case contains an excellent discussion of NLRB "managerial employes".

NLRB case law may be useful in considering what is or is not a "management level" employe. Nevertheless, the Pennsylvania definition is different from that of the NLRB and there is a tendency to forget that the PERA definition must be followed in public sector cases. The PLRB showed a burst of enthusiasm in *Philadelphia S.D.*, 4 PPER 128, 139, like that exhibited in the *West Shore S.D.* case, 3 PPER 1, wherein it adopted the NLRB definition of "confidential employe". That definition was corrected in *Altoona Area S.D.*, 7 PPER 76, 23 Pa. Cmwlth. 445, 352 A.2d 560 (1976). In *Philadelphia S.D.*, supra, the PLRB cites as the "fundamental test" for managerial status, an NLRB definition based on an NLRB case. This case seems to be a fluke and it appears unlikely that the PLRB will resort to NLRB precedent as more than an aid in establishing a definition.*(49)*

§5.4.2 Definition

As noted, there are three descriptions of management level employes in the statute. The first is: "any individual who is involved directly is the determination of policy...." Since the governmental body, the school district, the city, the township, etc., make policy at the highest level, managerial employes

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48. Ford Motor Co., 66 NLRB 1317, 1322 (1946).

49. However, see Bucks Co., 8 PPER 26, where PLRB followed Phila. S.D., supra.

would not be expected to make this policy. If fire marshalls or building inspectors make **recommendations** as to governmental policy, they meet the test of the definition.*(50)* Failure of evidence of setting policies of any sort has defeated the managerial exclusion.*(51)*

Hershey Medical Center, 6 PPER 191, 193, concerns a "clinical specialist" nurse:

> "clothed with the right and duty to make nursing policy. She is free from all supervisory authority normally exercised over basic unit people in order that she may pick and choose those cases of nursing that need special investigation and need special training or retraining. The permission to choose patients to handle is not made in the interest of keeping the particular patient being cared for at the time but is intended to upgrade the entire field as exemplified by the individual patient that the specialist chooses to work on."

This case clearly describes less than the highest level of policy making and provided some limited insight into policy making contemplated by the PLRB.

The sparcity of cases makes it impossible to say just what level of policy making the PLRB will accept. It would seem that "closeness to management" may be some guide in this determination. Certainly, the person making rules for union members to follow should be out of the union. If such person is not out of the union, the rules may show a strange tendency to favor fellow trade unionist.

The second standard for managerial employes is one "who responsibly directs the implementation" of policy. We are confronted with a question much like that noted above. We do not know what "policy" is encompassed in the phrase. On the one hand the PLRB has said that implementation of policy by the roadmaster, zoning officer, fire marshall, etc., in *Bensalem Township*, 5 PPER 58, is enough. See also *Trafford Boro.*, 6 PPER 72, where "decisionmaking concerning street repair and maintenance" were clearly functions that "can be characterized as implementation of policy". However, a financial

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50. Bensalem Twp., 5 PPER 58.

51. Washington Co., 4 PPER 68.

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operations officer and administrator in *Philadelphia S.D.*, 4 PPER 128, 139, were held not to implement policy. And, in *Philadelphia Housing Authority*, 3 PPER 312, project coordinators were held not managerial because they did not formulate policy.(*52*)

The Commonwealth Court found automotive equipment foremen to be managerial employes in *AFSCME v. PLRB*, 6 PPER 6, 17 Pa. Cmwlth. 83, 330 A.2d 300 (1975) and based its decision partly on the fact that "they responsibly direct the implementation of the policies of the district superintendent with respect to road construction and maintenance...."

The nature of "policy" discussed is closer to that in *Hershey Medical Center*, 6 PPER 191, 193, but again the level of policy is not clearly defined in the reported cases.

An interesting point is made in *City of Lebanon*, 4 PPER 24, 25:

> "Policy formulation and implementation must be distinguished from technical expertise. To define the problem and directly implement the proposed solution to a problem is not the same as performing a function within a known discipline with competence. The former has to do with policy and the latter deals with technical expertise. Establishing procedures on cyclical billing of sewer bills, establishing office procedures, reviewing electrical work, doing engineering work in the field, performing standard chemical tests on water are examples of technical expertise and not the formulation or implementation of policy."

This has a fine ring to it, but it does not seem to square well with the medical policy involved in *Hershey Medical Center*, 6 PPER 191, 193. It is suggested that policy is policy whether medical, technical or what-not.

If the foregoing two statements of what is a "management level employe" are somewhat unsettled, the third is well settled, and open to question. It states "...all employes above the first level of supervision". What does "above" mean? In *City of Lebanon*, 4 PPER 24, it meant that if a person

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52. See also Bucks Co., 8 PPER 26.

supervised as few as one other person, he met the definition.(*53*) This is the easy part of the definition.

However, in *Hershey Medical Center*, 6 PPER 191:

> The clinical specialist not only is paid a grade 7, three grades above the highest basic unit employe, but shares a private office with one of the top management employes. She reports only to this top management employe and usually discusses policy only with her. The clinical specialist is given fringe benefits reserved for supervisors and management people and which are not given to basic unit people. Given these conditions, that is, freedom from supervisory authority except top management, freedom to choose areas in which to work, fringe benefits only given to exempt people, ability to set nursing policy, there is no possibility that the clinical specialist can be placed in a basic unit nor even in a first level unit where the top salary paid is only grade 5. We will, therefore, hold that the clinical specialist is a management level employe not eligible to be placed in either a basic or first level unit.

The PLRB recognized clinical specialists as ''super'' employes, higher paid, with greater freedom and discretion, separate and ''above'' the rank and file. The ''aboveness'' will be a question to be struggled with in future cases.

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53. See also AFSCME v. PLRB, 6 PPER 6, 17 Pa. Cmwlth, 83, 330 A.2d 300 (1975).

§6. Bargaining

§6.1 Introduction

As previously noted, collective bargaining is the heart of PERA. All of its provisions are directed at allowing employes to band together and negotiate the wages, hours, terms and conditions of their employment with the public employer. Bargaining under PERA is different from bargaining under federal, private sector legislation. The purpose of this section is to describe the course of bargaining contemplated by PERA, to cite key differences between PERA and federal law and to point out unresolved problems existing under PERA.

§6.2 Necessity for Certification

In federal private sector labor cases, the NLRB has held that an employer may be compelled to bargain with a union even though there is no election and no NLRB certification. Examples of such instances include:

1. Where the employer determines a union's majority status by other than NLRB election, as by interrogating or otherwise polling employes, it cannot reject the results of such inquiry and refuse to bargain.(*1*)

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1. Nation-Wide Plastics Co., 197 NLRB 996; Taylor-Rose Mfg. Corp., 205 NLRB 262.

2. Where the employer has committed unfair labor practices of an "outrageous" and "pervasive" nature that so interferred with the union's organization of an employer's workforce, the NLRB has directed recognition of unions even though majority status is not attained.*(2)*

3. Other specific situations may oblige the employer to recognize a union without elections and NLRB certifications.

The PLRB has rejected this line of cases in reliance on the language of the statute that contemplates the finding of an appropriate unit for bargaining, certification by the PLRB and necessity for an election. The PLRB has held that there will not be a refusal to bargain until these formal requisites are complete.*(3)* Lack of certification is justification for refusal to "meet and discuss".*(4)*

One limited exception to the necessity for a PLRB unit finding and certification is contained in the "grandfather's" clause for "any employe representatives in existence on January 1, 1970...." That section presumes lawfulness but allows for challenges within limits provided therein.*(5)*

§6.3 Formalities of Bargaining Under PERA

Article VIII of PERA establishes certain procedures to be followed by the public employer and by the representative of the public employes. These include voluntary submission to mediation no later than 150 days prior to "budget submission date", mediation and fact finding. Section 803 makes it a "refusal to bargain" to "refuse to submit to the procedures set forth in section 801 and 802...." In *Center Co. Vo. Sch.*, 3 PPER 130, the board declined to find an unfair practice for failure to request mediation before an impasse existed but at a time when a request for mediation was timely under Section 802.*(6)* The PLRB said that calling for mediation then was "unrealistic", absent more than the passage of mere time limits.

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2. NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S. Ct. 1918, 23 L.Ed.2d 547 (1969).

3. 43 P.S. §1101.602 (a) and 1101.603 (a) (b) and (c). Gateway S.D., 6 PPER 329; Washington Co., 3 PPER 270, 273; Reynolds S. Bd., 3 PPER 228, 229; Somerset Co., 2 PPER 60.

4. Wallingford-Swarthmore S.D., 3 PPER 7, 8.

5. 43 P.S. §1101.602 (b).

6. 43 P.S. §1101.802.

In odd contrast, the PLRB did find it a refusal to bargain for an employer to refuse to choose an arbitrator, under the provisions of sections 805 and 806, relating to interest arbitration for guards in prisons and mental hospitals and necessary court employes.(7) Nothing in PERA states that such a refusal is a refusal to bargain and it might be contended that the courts were charged with directing compliance with these sections.(8)

In several cases, employers have refused to bargain with unions because the budget submission date is passed or so close that there can be no compliance with mediation requirements. The PLRB rejected cases under the "police and firemen's bargaining act", 43 P.S. §217.1, et seq., that excused this conduct and held the public employers guilty of unfair practices.(9) In that case and in *Ligonier Valley S.D.*, 2 PPER 159, the PLRB notes that compliance with mediation provisions before budget submission date under the "police and firemen bargaining act" are directed at binding arbitration, whereas the PERA provisions need be complied with only if the union wants to meet the conditions precedent to a strike.(10) The parties are bound to bargain whether the union may legally enforce its demands with a strike or not.

Further, school boards may make additional appropriations or transfer appropriations after the budget submission date.(11) One can bargain without spending more money or making concessions.(12)

The reader is directed to the chapter of this book on strikes for a diagram of the requirements of Section 801 and Section 802 relative to times for bargaining, mediation, appointment of fact finders and strikes.

§6.4 Individual Contract, Objections to Bargaining Team

When a collective bargaining agent has been designated, the public employer cannot decline to bargain because it has

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7. Tioga Co. Com., 2 PPER 89.

8. See also Berks Co. Com., 7 PPER 259.

9. City of Williamsport, 1 PPER 1.

10. See 43 P.S. §1101.1002.

11. Bellwood-Antis S.D., 1 PPER 119.

12. Reynolds S.Bd., 3 PPER 228; Muhlenberg Twp. S.D., 4 PPER 33. See also Luzerne Co. Com., 4 PPER 87; Butler Co., 2 PPER 221.

previously executed individual contracts with its employes. The individual contracts must bow to the right of the union to negotiate for all employes.(*13*)

The other side of the coin is that the employer need not and must not bargain with individual employes or minority unions after the collective bargaining representative has been properly designated.(*14*)

As a general rule, a public employer does not have standing to object to the composition of a union's bargaining team. Teachers from other school districts may properly serve as members of the bargaining team.(*15*) Department heads from the home school district may be bargainers so long as they are not part of management.(*16*) However, the union may not demand that the **school board** meet with them in place of the appointed bargaining team.(*17*) It is also improper for a school board to insist that a union wait until newly elected board members are installed before bargaining begins.(*18*) Also, the employer cannot demand that the union be represented in bargaining by its attorney.(*19*)

Early in the existence of the act, the PLRB decided that first level supervisors were too closely aliened with management to be part of the union bargaining team.(*20*) This conclusion was affirmed in *Eastern Lancaster Co. S.D.*, C.P., Lancaster Co., 3 PPER 141. The logic in these decisions is consistent with the problem discussed in Section 5.2.1 Supervisors - Conflicting Loyalties and in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485; 67 S. Ct. 789, 91 L.Ed. 1040 (1946). However, the *Eastern Lancaster* case, **supra**, was reversed on the particular facts of that case in *PLRB v. Eastern Lancaster S.D.*, 4 PPER 1, 11 Pa. Cmwlth. 482, 315 A.2d 382 (1974).(*21*)

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13. Beaver Co. Com. College, 2 PPER 131; Canon-McMillan S.D., 2 PPER 150, both citing J. I. Case v. NLRB, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762 (1944).

14. Gen. Braddock Area S.D., 4 PPER 86.

15. Greater Nanticoke Area S.D., 3 PPER 157.

16. Bristol Boro. S.D., 2 PPER 67.

17. School District of City of Erie, 7 PPER 34.

18. Wattsburg A.S.D., 7 PPER 112.

19. Norristown Borough; 8 PPER 70.

20. Pocono Mountain S.D., 1 PPER 38.

21. See Section 8.10, Conflict of Interest Provisions.

§6.5 Scope of Bargaining

One of the most troublesome issues under PERA is deciding what is within the scope of bargaining. The NLRB has long been confronted with this question and although it is generally resolved, there is still a problem as to whether an employer may refuse to negotiate, or a union insist upon negotiating particular items. The law under PERA is even more uncertain since there are specific statutory statements about matters that the employer may not bargain or agree to, and that the employer may or may not bargain at its discretion. Following is a brief discussion of bargaining under NLMRA.

Under the federal act, the NLRB has found that subjects on which bargaining is sought may be ''bargainable'', ''nonbargainable'', or ''permissive'' subjects of bargainining. Examples of **bargainable** items would be such things as wages, hours, pensions and other matters that are unquestionably terms and conditions of employment. **Nonbargainable** subjects are items upon which bargaining is foreclosed because a term **must be** included in the contract or because it **may not be included** in the contract. An employer is not obliged to bargain about a closed shop under the federal act. It would be unlawful for a minority union to demand exclusive representation of all employes. A party may not demand bargaining on a subject which is outside the definition of ''wages, hours and other terms and conditions of employment''. **Permissive subjects of bargaining** are lawful subjects of contract but those which a party cannot insist upon to impasse. The United States Supreme Court has discussed this matter in *NLRB v. Borg-Warner Corporation*, 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958).

''Bargainable'', ''nonbargainable'', and ''permissive'' subjects of bargaining are treated as follows in so far as unfair labor practice charges are concerned. Bargainable matters must be bargained and a refusal to bargain about them constitutes an unfair labor practice. Similarly, nonbargainable matters need not be bargained or discussed at all and an unfair labor practice will not result from such a refusal. Permissive subjects of bargaining may be bargained if the parties agreed to do so; however, insistence on a permissive subject of bargaining to the point of impasse does constitute an unlawful refusal to bargain and can constitute an unfair labor practice.

Almost of necessity PERA has carried over the three forms of bargaining. Also, there is a great deal of confusion surrounding what is and is not bargainable. NLRB precedent may be helpful, but the Pennsylvania Supreme Court has said that public sector bargaining is sufficiently different that NLRB precedent cannot be blindly accepted.(*22*)

§6.6 Statutory Provisions

PERA describes bargainable items as follows:

> Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employes to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached but such obligation does not compel either party to agree to a proposal or require the making of a concession.(*23*)

The foregoing quotation is not an answer to the question of what is bargainable, but is a beginning. This section is closely intertwined with Section 702 of the act which provides as follows:

> Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employe representatives.(*24*)

Also important to a decision as to what is bargainable is Section 703.

> The parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining

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22. **PLRB v. State College Area School District**, 6 PPER 92, 461 Pa. 494, 337 A.2d 262, (1975).

23. 43 P.S. §1101.701.

24. 43 P.S. §1101.702.

> agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of the commonwealth of Pennsylvania or the provisions of municipal home rule charters.(*25*)

In *PLRB v. State College Area School District,* 6 PPER 92, 461 Pa. 494, 337 A.2d 262 (1975), the Supreme Court wrestled with the question of what would and what would not be bargainable under PERA. The case was most concerned with the inter-relationship of sections 701, 702 and 703.(*26*) Proposals affecting wages, hours and other terms and conditions of employment but not touching matters of inherent managerial policy or conflict of statute were regarded as bargainable subjects. Where there appeared to be a conflict with Section 702 and where there was a question of the proposed term being a matter of "inherent managerial policy," the court stated:

> "Thus we hold that where an item of dispute is a matter of fundamental concern to the employes' interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under Section 701 simply because it may touch upon basic policy. It is the duty of the board in the first instance and the courts thereafter to determine whether the **impact** of the issue on the interest of the employe in wages, hours and terms and conditions of employment outweighs its probable affect on the basic policy of the system as a whole. If it is determined that the matter is one of inherent managerial policy but does effect wages, hours and terms and conditions of employment, the public employer shall be required to meet and discuss such subject upon request by the public employe's representative pursuant to Section 702." Emphasis added(*27*)

The Supreme Court thus enunciates a "balancing" test where the interest of the employer in the matter alleged to be of inherent managerial policy is weighed against the interest of the employe in having a provision dealing with the subject in his labor contract.

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25. 43 P.S. §1101.703.

26. 43 P.S. §1101.701, §1101.702 and §1101.703.

27. 461 Pa. 507.

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It would seem reasonable for the PLRB and the courts to consider several matters in deciding "impact": 1) The extent to which other terms and conditions of work may be modified to reduce the effect of the "policy" term on employes. For example, employes might seek to bargain about the amount of work that they would do each day. The employer claims this to be a matter of inherent managerial policy. The labor union could negotiate maximum number of hours worked per day, overtime rates for hours in excess of a certain number per day, rest periods and so forth. The well-being of the employe could be protected without the union actually bargaining about how much work should be done in one day. 2) The grievance procedure may be used to attack employer demands in the policy area. Using the example of excessive work, employes might grieve poor performance gradings and show that they had poor performance ratings because they were assigned too much work. In this matter, excessive work could not be forced upon employes with a threat that they would be fired or denied promotions if they did not do it. 3) Matters of inherent managerial policy may be treated in "meet and discuss" sessions. Meet and discuss sessions are not specifically referred to in federal legislation and are related to matters of inherent managerial policy. If an item is such that it is well suited to a meet and discuss session, the PLRB or the courts might well exclude it from bargaining with the thought that it was really better adapted to meet and discuss.(*28*)

The Supreme Court dealt with Section 703 in the following manner.(*28*) The Commonwealth Court had reasoned that the duties and prerogatives imposed upon the school boards under the Public School Code could not be the subject of collective bargaining because of Section 703. The Supreme Court ruled that merely because a subject was covered by legislation did not remove it from collective bargaining under Section 701. The Supreme Court regarded Section 703 as only preventing agreement to, or implementation of, a term that would be in violation of or inconsistent with statute. Thus, although the Public School Code dealt with minimum wages for teachers, the school districts could bargain for more money. Where, however, a statute mandated a particular responsibility to be discharged by the school board and the school board alone or where the statute provided for no deviation from its standard, it could not be modified by bargaining.

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28. 43 P.S. §1101.703.

§6.7 Specific Subjects of Bargaining

There have not been that many cases in which subjects of bargaining have been considered since the Supreme Court's decision in *PLRB v. State College Area Sch. Dist.*, supra. However, some guidance can be provided by prior decisions and hereafter are discussed some of the subjects of bargaining that have been considered by the PLRB.

1. **Wages**

It is obvious that wages of employes are a subject of bargaining. This is true even though the wages in question are to be paid only to future employes as in the case of starting rates.(*29*) The fact that the program bringing about the wages need not be instituted by the school and that the decision to have it is one of inherent managerial policy, does not remove wages paid persons working on the program from bargaining. A school district need not negotiate its extra-curricular school activities, but it must negotiate wages, hours and working conditions for employes working on these programs.(*30*) Wages for teachers in experimental programs must be bargained.(*31*) The wages of athletic directors must be negotiated with the union even though the school feels it should give an athletic director more.(*32*)

In conflict with these cases is the decision in *Dauphin County Technical Sch.*, 3 PPER 46. The PLRB said that the adult education program was such a speculative thing that the employes in it should be treated as casual employes even though they spent the rest of their time working for the school district. It did not require bargaining for their wages for the adult education program.

2. **Subcontracting** — See Section 6.8.4, Subcontracting.

3. **Class Preparation Time**

In three cases this has been held to be a matter of inherent managerial policy and bargainable only by permission of the

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29. Warwick Area Bd. of Sch. Directors, 3 PPER 15.

30. Canon-McMillan Sch. Brd., 1 PPER 83 and 2 PPER 22 and 4 PPER 31, 12 Pa. Cmwlth. 323, 316 A.2d 114, (1974); Kiskey Area Sch. Dist., 2 PPER 66; Cameron County Sch. Dist., 2 PPER 187.

31. Coatesville Area Sch. Dist., 3 PPER 224.

32. Duquesne County Sch. Dist., 6 PPER 202.

employer.(*33*) These decisions are suspect because of the Supreme Court decision in the *State College* case.

4.Accumulation of Sick Leave

Accumulation of sick leave was first regarded as a bargainable matter in *Richland Sch. Dist.*, 2 PPER 195. The PLRB reversed itself and held it nonbargainable in *Richland Sch. Dist.*, 4 PPER 2.

In *PSEA v. Baldwin Whitehall School District et al*, ____Pa. Cmwlth. ____, 372 A.2d 960 (1977) the issue involved a contract provision that provided for a "retirement allowance" that was based upon an employe's unused accumulated sick leave. The Commonwealth Court determined that the contract provision did not conflict with a provision of the Public School Code, 24 P.S. §11-1154 dealing with sick leave in that the contract provision related to a "retirement allowance" and not sick leave. The retirement allowance "merely happens to be computed on the basis of accumulated sick leave". Two judges dissented from this conclusion, asserting that the Legislature had spelled out a Public School Employes' Retirement Code and did not intend collective bargaining to establish a supplement to this. It may also be suggested that merely changing the name of the payment from "accumulated sick leave" to "retirement allowance" did not change the nature of the payment and that it was still in fact payment of "accumulated sick leave".

5. Compensation for Court and School Board Appearances

This was regarded as bargainable in *Richland Sch. Dist.*, 2 PPER 195.

6. Bereavement Leave

Bereavement leave was considered a bargainable provision in *Richland Sch. Dist.*. 2 PPER 195.

7. The Procedure to be Utilized When Teachers Were Assaulted

The procedure the school board would follow if there were an assault on a teacher was held to be bargainable in *Richland Sch. Dist.*, 2 PPER 195.

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33. Nazareth Area Ed. Assn., 2 PPER 194; Bristol Township Ed. Assn., 3 PPER 308; State College Ed. Assn. v. PLRB, 3 PPER 168, 9 Pa. Cmwlth. Ct. 229, 306 A.2d 404 (1973).

8. Reimbursement for Losses, Damages and/or Medical Expenses Incurred at One's Place of Employment

The losses cited in the heading herein were held bargainable in *Richland Sch. Dist.*, 2 PPER 195.

9. Grievance and Arbitration Procedure

Section 903 makes arbitration of disputes arising out of interpretation of the contract mandatory. It says the arbitration procedure is a proper subject of bargaining so long as it provides for a binding decision by the arbitrator.(*34*)

However, interest arbitration, wherein disputes as to contract language is resolved is not a mandatory subject of bargaining.(*35*)

10. The Nature of Instructional Printed Material to be Used in the Classroom

The described instructional material need not be determined by collective bargaining as this appears to be a matter of inherent managerial policy.(*36*)

11. Allowance for Planning Time for Teams of Teachers

Planning time was held a matter of inherent managerial policy.(*37*)

12. Desk and Locker Space for Teachers

School districts were not obliged to bargain about desks and locker space for teachers in that the Commonwealth Court, following PLRB rulings, regarded this as inherent managerial policy.(*38*)

13. Elimination of Nonteaching Hall Duty, Duty at Athletic Activities, Bus Duty, Lunch Duty, Study Hall and Parking Lot Duty

The cited nonteaching duties were regarded as permissive subjects of bargaining and as being involved in inherent managerial policy.(*39*)

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34. 43 P.S. §1101.903.

35. Richland Sch. Dist., 4 PPER 2.

36. Bristol Township Ed. Assn., 3 PPER 308; State College Ed. Assn. v. PLRB, supra.

37. Bristol Township Ed. Assn., 3 PPER 308; State College Ed. Assn. v. PLRB, supra.

38. Bristol Township Ed. Assn., supra; State College Ed. Assn. v. PLRB, supra.

39. Bristol Township Ed. Assn., supra; State College Ed. Assn. v. PLRB, supra.

14. Place of Teaching

The place where teachers would do their teaching was considered a matter of inherent managerial policy and a subject about which school districts were not required to bargain.(*40*)

15. Teacher Assignment to Substitute Duties

The question of whether full-time teachers could be assigned to substitute for absent teachers was held to be a matter of inherent managerial policy.(*41*)

16. Maximum Class Size

The maximum number of pupils in a classroom was held to be a matter of inherent managerial policy.(*42*)

17. Calendar Year

The calendar year for a school district was a matter of inherent managerial policy and bargainable by permission of the school district.(*43*)

18. Time Scheduled for Staff Meetings

The time when staff meetings were scheduled was held to be a matter of inherent managerial policy.(*44*) However, in *City of Philadelphia*, 3 PPER 143, a unilateral change in the hours when a microbiologist worked was regarded as an unfair labor practice. If changing scheduled is a matter of inherent managerial policy, one wonders why it was a refusal to bargain for the employer to change one person's work schedule.

19. Maximum Hours of Teaching

Maximum hours of teaching was held to be a matter of inherent managerial policy.(*45*)

20. Advance Notice of Teaching Assignments

In the following cases, it was held that bargaining on notice of teaching assignments was permissive, and a matter of

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40. Bristol Township Ed. Assn., supra; State College Ed. Assn. v. PLRB, supra.

41. Bristol Township Ed. Assn., supra; State College Ed. Assn. v. PLRB, supra.

42. Bristol Township Ed. Assn., supra; State College Ed. Assn. v. PLRB, supra. See also PSSU v. PLRB, 5 PPER 64, 15 Pa. Cmwlth. 441, 325 A.2d 659 (1974), now on appeal to the Supreme Court.

43. Bristol Township Ed. Assn., supra; State College Ed. Assn. v. PLRB, supra; North Cambria Sch. Dist., 3 PPER 318; Richland Sch. Dist., 4 PPER 2, Appalachia Intermediate Unit 8, 8 PPER 75.

44. Bristol Township Ed. Assn., 3 PPER 308; State College Ed. Assn. v. PLRB, supra.

45. Bristol Township Ed. Assn., supra; State College Ed. Assn. v. PLRB, supra.

inherent managerial policy. *Bristol Township Ed. Assn.*, **supra**; *State College Ed. Assn. v. PLRB*, **supra**; *Richland Sch. Dist.*, 4 PPER 2.

21. Establishment of a Teachers' Cafeteria

It was found that it was unnecessary to bargain about establishing a separate teachers' cafeteria as this was a matter of inherent managerial policy.(*46*)

22. Mileage Allowance for Use of One's Own Automobile

Mileage compensation was held to be a proper subject of bargaining in *City of Wilkes-Barre*, 3 PPER 381.

23. Free Time to Attend Union Meetings

A demand to allow employes to be free on one evening per week to attend association meetings was held to be a matter of inherent managerial policy in *State College Ed. Assn. v. PLRB*, **supra**.

24. Freedom to Leave the School Building When One Had No Teaching Duties

A demand that teachers be allowed to leave a school building when they had no teaching duties was held a matter of inherent managerial policy.(*47*)

25. Changes in Scheduling of Parent-Teacher Meetings

State College Ed. Assn. v. PLRB, **supra**, held that a request to vary the scheduling of parent-teacher meetings was a matter of inherent managerial policy and not a subject of mandatory bargaining.

A word of caution is repeated. Most of the above holdings occurred before the decision of the Supreme Court in *PLRB v. State College Area Sch. Dist.*, **supra**. How that decision will affect these older holdings is uncertain but it would be presumed that a fair number of the prior holdings would be reversed.

§6.8 Specific Refusals to Bargain

Certain refusals by the employer have been held to constitute refusals to bargain although the precise refusal may seem somewhat removed from the concept "refusal to

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46. Bristol Township Ed. Assn., supra; State College Ed. Assn. v. PLRB, supra.

47. State College Ed. Assn. v. PLRB, supra.

bargain''. Following are several examples of conduct constituting refusals to bargain by the PLRB. The principles behind these ''refusals'' were established initially by the NLRB and were carried over into Pennsylvania law. If one is confronted with one of these specialized refusals to bargain, he would do well to consult NLRB precedent for qualifications and defenses to the asserted unfair labor practice. Since the basic unfair practices have been carried over from federal law, Pennsylvania law will undoubtedly adopt federal defenses not yet mentioned in Pennsylvania practice.

§6.8.1 Refusal to Supply Information Needed for Bargaining

The NLRB has long held that the employer is under a duty to furnish a labor union with records and information reasonably necessary to allow the union to bargain collectively. Behind the rule is the concept that you cannot engage in bargaining unless you know what you are bargaining from.*(48)* One cannot seek improvements in insurance policies unless the policies are furnished.

Much the same rules apply to grievance handling. A union grieving an improper layoff can quite reasonably demand the names of persons who worked during the disputed period so that it can see if less senior employes were retained when more senior employes were laid off. There are times when information about bargaining unit employes may be relevant to grievance handling. This data is also due the union.*(49)*

Unions tend to expand their right to get internal employer information. Unless the demanded data has bearing on negotiations or grievance handling, the demand will not be sustained.*(50)* Similarly, unions can demand facts, not conclusions or interpretations of facts. They cannot compel stipulations under the guise of getting information.*(51)*

§6.8.2 Refusal to Reduce a Contract to Writing

PERA provides:

''1201 (a) **Public employers**, their agents or representatives are prohibited from

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48. **Community Mental Health Center of Beaver Co.**, 8 PPER 114.

49. **Bethel Park S.D.**, 3 PPER 174; **City of Williamsport**, 2 PPER 163, 165.

50. **Greater Greensburg Sewage Authority**, 6 PPER 37.

51. **Bellefonte S.D.**, 3 PPER 26.

(6) Refusing to reduce a collective bargaining agreement to writing and sign such agreement."

"1201 (b) **Employe organizations**, their agents or representatives, or public employes are prohibited from:

(5) Refusing to reduce a collective bargaining agreement to writing and sign such agreement."

Once again, this is a rule carried over from NLRB and NLRB precedent should be most helpful. However, the Pennsylvania cases have dealt with this variation of "refusal to bargain" as follows.

Like many NLRB cases, the PLRB has most frequently been confronted with the question of whether any agreement had actually been reached when considering refusal to reduce an agreement to written form.(*52*)

Where the PLRB was confronted with a settlement reached by school board counsel at a PLRB hearing and refusal of a school board to ratify the agreement, it did find an unfair practice. Similarly, it did not allow delay in execution of an agreement merely because the public employer was still litigating a finding as to its not being a joint employer.(*53*) Prolonged unexplained delay in signing the contract is also a basis for finding of an unfair practice.(*54*)

§6.8.3 Unilateral Changes in Working Conditions

When the employer makes a change in "wages, hours or conditions" of employment affecting an existing bargaining unit, there may be an unlawful refusal to bargain. (If the bargaining unit is not yet certified when the change is made, there is no violation.(*55*) Unilateral changes are refusals to bargain since they preclude any opportunity to bargain.

The PLRB has found various employer changes to constitute refusals to bargain: unilateral discontinuance of the

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52. W. Greene S.D., 5 PPER 8; PLRB v. Lickert, 4 PPER 52; Operating Engineers, 5 PPER 72; City of Farrell, 6 PPER 102; Susquenita Bd. of Education, 6 PPER 115; Centennial S.D., 6 PPER 301; Luzerne Co. Community College, 8 PPER 113.

53. Washington Co., 6 PPER 104.

54. Lebanon S.D., 8 PPER 121.

55. Gateway S.D., 6 PPER 329.

Christmas bonus(*56*); unilateral wage increases during negotiations(*57*); change in method of payment for "no work" days(*58*); unilateral change in mileage allowance(*59*); employer announced intent to make employes "go by the book" after a union was selected and this was a unilateral change from prior practices(*60*); unilateral decision to terminate one run of school buses(*61*); discontinuance of two holidays(*62*); substitution of paid teachers with unpaid volunteers.(*63*)

In *City of McKeesport*, 3 PPER 161, the PLRB said that demotion of one employe without talking to the union about it was a "refusal to bargain". The case was colored by charges of discrimination for giving testimony at a PLRB hearing, and it is suggested that the PLRB is expanding "refusal to bargain" charges beyond all logic if it is to regard each and every demotion as a potential unfair labor practice. The holding in *Baldwin-Whitehall S.D.*, 7 PPER 221, seems more reasonable:

> "From a review of the record, it would appear that such action did not consitute a failure on the part of the respondent to bargain collectively in good faith. In the absence of unusual circumstances, which do not appear in this case, the respondent has the right, without violating the act, to refrain from hiring or transferring personnel as a regular exercise of their rights as employers unless in doing so they are motivated by anti-union animus against an employe or are attempting to discourage union membership by their actions. Here the respondent proceeded as it always has in the past under previous contracts and no objection had been lodged previously. There does not appear to be any basis for claiming a violation of the act under the facts and circumstances of this particular case."

Similarly, a holding of no "refusal to bargain" when the school board set wages for new hires in positions not covered by

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56. Boro. of Berwick, 3 PPER 183.

57. Highland Sewer and Water Auth., 4 PPER 116; Reynolds S.D., 3 PPER 228.

58. Allegheny Twp., 3 PPER 332.

59. City of Wilke-Barre, 3 PPER 381.

60. Lawrence Co. Housing Auth., 5 PPER 40.

61. Upper St. Clair S.D., 5 PPER 96.

62. Clarion Co. Commissioners, 8 PPER 106.

63. Mars Area S.D., 3 PPER 163, reversed by Court of Common Pleas of Butler Co., 5 PPER 43; reversal upheld by the Commonwealth Court, 6 PPER 218, 21 Pa. Cmwlth. 230, 344 A.2d 284 (1975). See also Clarion Co. Commissioners, 8 PPER 107.

the contract was undoubtedly correct. Dicta in that case that a "refusal to bargain" might exist if there were anti-union intent creates a troublesome uncertainty as to how the PLRB may interpret these cases in the future.*(64)*

Most of the items discussed above are not based on or related to contract terms. If the union claims a unilateral change of contract terms and the dispute resolves itself into a problem of contract interpretation, the arbitrator and not the PLRB is the person to resolve the dispute. The PLRB has said that it is not in business to interpret or enforce contracts.*(65)* However, noncontractual conditions of employment may not be terminated on the whim of the public employer. The mere fact that they are not written into the contract does not mean that the employer must not bargain with the union before changing them.*(66)* However, noncontractual conditions of employment frequently are favorable to the employer's position and have been called upon to justify actions not included in the written contract.*(67)* In the two cited cases, the continuation of merit increases for employes was justified on the basis of past practice, not terminated by contract.

In recent years, the biggest area of concern about unilateral termination of benefits has involved school districts that have terminated health and other insurance benefits when the union contract runs out. Discontinuance of insurance benefits at the expiration of the contract puts union membership at a considerable disadvantage and can be used as a means to compel the union to execute a new contract on terms favorable to the school district. The school district reasons that since the contract has expired, there is no continued requirement in paying for insurance and that it does nothing wrong when it terminates it.

In a chain of cases the PLRB has followed NLRB precedent and regarded termination of insurance benefits, even

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64. **Chartiers Valley Sch. Bd.**, 4 PPER 90.

65. **Scranton S.D.**, 6 PPER 298; **Warwick S.D.**, 4 PPER 146; **S.D. of City of Erie**, 7 PPER 34.

66. See cases in preceding paragraph.

67. **City of Harrisburg**, 6 PPER 343, 22 Pa. Cmwlth. 371, 348, A.2d 921 (1975); **Muhlenberg Twp. S.D.**, 4 PPER 33.

after contract expiration, as a refusal to bargain.*(68)* Note, that the restriction on termination of benefits described above does not apply when employes actually strike. Just as the employer is not obliged to pay salary to striking employes, so he is ordinarily not obliged to continue other benefits.*(69)*

The reasoning behind the conclusion that there is a unilateral change in working conditions and refusal to bargain when benefits are terminated at expiration of the contract is that terms and conditions of employment, contractual or otherwise, may not be changed without discussing them with the union. If the employer has bargained about making a proposed change in the contract and if the parties bargain to impasse, the employer is free to implement the change.*(70)* However, if the subject of elimination of insurance benefits has never arisen in the course of bargaining, and at the expiration of the contract the employer simply terminates the benefit, there has been a unilateral change in working conditions, constituting a refusal to bargain.

The Commonwealth Court has not accepted the foregoing reasoning. In *Appeal of Cumberland Valley School District*, ____ Pa. Cmwlth. ____, ____ A.2d ____ (1977). the Commonwealth Court overruled the Court of Common Pleas of Cumberland County and dismissed the union charge of refusal to bargain. In this case, the school district had discontinued payment of medical and hospitalization premiums, life insurance premiums and certain limited tuition cost reimbursements. At the heart of the Commonwealth Court decision is the idea that when the contract has expired, "there is no continuing obligation on the part of the school district to make payment of benefits provided for under the expired contract". The court also rejects the idea that discontinuance of the cited benefits interfered with employe rights to organize and bargain, in that the employer merely followed the terms of the contract and that when the contract was no more, the benefits were also no more.*(71)*

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68. **Conemaugh S.D.**, 2 PPER 104; **Hickory Twp. Board of Education**, 6 PPER 222; **Dallastown Area S.D.**, 6 PPER 236, 7 PPER 102; **Cumberland Valley S.D.**, 6 PPER 211; C.P., Cumberland Co., 7 PPER 250, reversed ____ Pa. Cmwlth. ____, ____ A.2d ____ (1977); **Curwensville Area S.D.**, 6 PPER 327; **Laurel S.D.**, 6 PPER 351; **Central Dauphin S.D.**, 7 PPER 297.

69. **Hazelton Area S.D.**, 7 PPER 234; **W. Mifflin Area S.D.**, 6 PPER 139.

70. **City of Philadelphia**, 3 PPER 143; **Sto-Rox S.D.**, 4 PPER 35.

71. See also **PLRB v. Williamsport A.S.D.**, ____ Pa. Cmwlth. ____, 370 A.2d 1241 (1977).

This decision may have been influenced by the fact that the contract expired and the benefits were terminated during the summer vacation. In this regard the court said:

> "We simply hold, on this record, that **when there are no services being performed by the employes**, when the previous contract has expired, and when the collective bargaining is, in fact, taking place, a public employer is not, as a matter of law, committing an unfair labor practice under either Section 1201 (a) (1) or Section 1201 (a) (5) of PERA when it refuses to continue to pay economic fringe benefits which were provided by the terms of the contract which has expired."(72)

It seems a near certainty that this decision will be appealed to the Pennsylvania Supreme Court. Although it is a victory for the employer, it adds an uncertainty to public sector labor relations.

On the basis of the *Cumberland Valley* decision public employers may terminate benefits on contract expiration. There may be some question as to the propriety of continuing benefits after contract expiration date. If the benefits are to be continued, it is surely appropriate to provide some governmental resolution to so continue them. There may be good industrial relations reasons for continuing benefits even after the contract has expired. It may be that agreement on the contract is so close that termination of benefits would only serve to antagonize the union and drive the parties farther apart. It may be that the school district simply does not want to exert "muscle" and create ill will among employes. Further, it may be that the public employer does not want to expose itself to the financial loss that could occur if the Supreme Court would reverse the *Cumberland Valley* decision. Public employers who would discontinue insurance benefits with no provision for protection of their employes run the risk of doing it improperly, having employes incur substantial medical bills or having deaths that would require payment of life insurance benefits as if the policies were in effect. If the public employer is found to have improperly discontinued the insurance plans, the PLRB and the courts may require the employer to pay for losses to employes caused by the termination of insurance.

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72. Appeal of Cumberland Valley S.D., supra, emphasis added.

In the light of the *Cumberland Valley* decision, a public employer may do well to sit down with his union prior to the expiration of the union contract, call the union's attention to the rule enunciated in that case and the problem of payment of funds for benefits that are not required by contract. The public employer can negotiate with the employe organization as to how to treat benefits that may expire with the contract. The employer may agree to pay insurance costs itself, or it may reach agreement that employes shall pay the public employer, which will apply the funds to the insurance premiums. Other arrangements can be devised in the course of negotiating with the union. The point is that the employer is presented with the problem of no longer being obliged to pay for benefits under the holding in *Cumberland Valley*. Whether that decision is upheld by the Supreme Court or not, the employer will have protected itself by actually resorting to bargaining about what shall be done about the benefits in question. If no agreement can be reached with the union about interim payment of premiums, the employer who would terminate payment of premiums, can answer a "refusal to bargain" charge with the *Cumberland Valley* decision and the argument that it actually did bargain with its union about termination of payment of premiums. One word of caution is appropriate; one cannot come to the bargaining table with a preconceived determination to discontinue certain benefits. To be true bargaining, there must be a willingness to accomodate oneself to reasonable union demands. Obviously, reasonableness is an uncertain term that will vary with the situation.

§6.8.4 Subcontracting

Subcontracting of work theretofore done by the bargaining unit is a first cousin to unilateral discontinuance of terms and conditions of employment. It looks to federal, private sector cases for its origin.(*73*) Federal precedent bears heavily in working refinements to this concept. The issue of necessity to bargain subcontracting has come before the Pennsylvania Supreme Court in *Boro. of Wilkinsburg v. Sanitation Department*, 6 PPER 255, 463 Pa. 521, 345 A.2d 641 (1975). In that case the borough of Wilkinsburg had bargained with the union about discontinuing refuse collection and had been unable to reach agreement. The union charged the unfair labor

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73. **Fiberboard Paper Prod. Corp. v. NLRB**, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964).

practice of refusing to bargain which was dismissed by the PLRB. The Commonwealth Court agreed with the PLRB's decision that subcontracting was a matter of "inherent managerial policy" and that the employer was obliged to "meet and discuss" rather than bargain. On this basis and on the basis that the employer had done this, the unfair labor practice charge was dismissed. The Supreme Court noted that it had decided *PLRB v. State College Area S.D.*, 6 PPER 92, 461 Pa. 494, 337 A.2d 262 (1975) and that it was somewhat inclined to send the case back to the Commonwealth Court for reconsideration in light of that decision. The Supreme Court questioned whether subcontracting was a matter of inherent managerial policy and required only "meet and discuss", or was a "term and condition of employment" and required bargaining. However, this issue was not reached and the Supreme Court affirmed the dismissal of the unfair labor practice on the basis of the employer having properly bargained **or** "met and discussed".

The PLRB was presented with a case very similar to the *Wilkinsburg Borough* case when the *McKeesport Area S.D.*, 6 PPER 153, decided to discontinue its busing operation and have a private contractor provide bus services for the school. The PLRB discussed the decision of the Supreme Court in the *Wilkinsburg Borough* case, balanced the 'employes' interest in wages, hours and other terms and conditions of employment" against the "probable effect on the basic policy of the system as a whole", and concluded that the school district was obliged to **bargain** on subcontracting.

In the *McKeesport* case, the PLRB seemed to say that a true "inherent managerial policy" decision would be one of continuing or discontinuing **any** bus service, and that since the school district was obliged to provide busing, there would be no policy decision involved and that whatever was done there could not be a matter of inherent managerial policy. Although this is a subject for a section of this book on scope of bargaining, the reasoning of the board seems suspect. However, the end conclusion is not unreasonable. In *City of Clairton*, 3 PPER 251, the PLRB regarded subcontracting as a "meet and discuss" and not a bargainable matter, "clearly matter of managerial policy."(74)

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74. 1201 (a) (9) not (a) (5).

Millcreek Twp. S.D., 7 PPER 91 is a case where the employer **completely terminated** its busing service and volunteered to bargain with the union concerning subcontracting its busing service. The PLRB noted that the Public School Code allowed discontinuance of busing service and quoted *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), for the proposition that **complete** discontinuance of busing service was proper. The interpretation of *Darlington* is suspect since the school district's other activities continued and the threat of discontinuing the bus service undoubtedly had a chilling effect on other union-minded employes. However, there **did** appear to be bargaining to impasse on the subject of discontinuing the bus service and on that basis the decision appears correct.*(75)*

PLRB v. Mars A.S.D., 6 PPER 218, 21 Cmwlth. Ct. 230, 344 A.2d 284 (1975) deals with the question of economic necessity as inherent managerial policy. The School District eliminated paid teacher's aides as part of an economy move and utilized an existing group of unpaid volunteers in their stead. The court regarded the reduction in expenditures and the decision to eliminate the paid aides as matters of inherent managerial policy. As violation of the "meet and discuss" requirement was not alleged, the court did not consider this aspect of the case.

Where there is economic motivation, and true good-faith bargaining on subcontracting, charges of refusal to bargain have not been sustained.*(76)* In the *City of Pittsburgh*, 2 PPER 216, 3 PPER 238 and Court of Common Pleas decision, 4 PPER 108, there was a dispute between the mayor and city council over termination of a group of persons collecting money from parking meters. The work was subcontracted and the PLRB reversed its nisi decision, when it found refusal to bargain, since it considered the subcontracting as a legislative rather than an executive act. The Court of Common Pleas of Allegheny County reversed this decision and said that it would make no difference whether subcontracting were caused by municipal legislation or executive action, there was still a refusal to bargain.

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75. See also Rostraver Twp., 7 PPER 176 and North Hills S.D., 7 PPER 44 and 7 PPER 121.

76. Emsworth Boro., 4 PPER 114; Coatesville Area S.D., 4 PPER 155.

Where the contract is silent on the subject, the PLRB has held:

> "This board, in the absence of clear and unmistakable showing of waiver of its right to bargain over a mandatory topic of bargaining (subcontracting training camp food service) by a union, will not permit an employer to make a unilateral change...."(77)

Subcontracting can become intertwined with charges of interfering with unions and discrimination against union members. In *Episcopal Hospital*, 2 PPER 219, the union was not yet certified when the hospital discontinued and subcontracted its guard service. Because there was no certification, there could not be a violation of 1201(a)(5) (the refusal to bargain section) and the PLRB decided that there was not a violation of Section 1201(a)(1) and (3) (the interference and discrimination sections) since the hospital had been contemplating subcontracting and other cost saving efforts long before the union appeared upon the scene. Though the subcontracting occurred in the midst of organizing the hospital, no anti-union animus was shown. The PLRB finds a refusal to bargain in *Westmoreland Fayette Municipal Sewage Auth.*, 3 PPER 65, and implies that it was an employer's intent to reduce the bargaining unit. Although anti-union animus is not an element in a refusal to bargain charge in the federal sector, the PLRB has had language running through several of its cases that indicates it may believe this to be an essential element in refusal to bargain cases.(*78*)

> "The presence or absence of good faith is immaterial when the evidence shows by substantial and legally credible evidence that respondent has refused to bargain."

Another interesting case involved a complaint by a union that the employer has subcontracted work customarily done by municipal employes. It became necessary for the borough of Westview to mail out 41,000 notices. This was beyond the capability of borough employes and the work was subcontracted. The board noted that no jobs had been eliminated nor work curtailed and that the only possible loss was that of potential overtime. Short-term increases in the demand for work and lack

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77. Greensburg-Salem S.D., 7 PPER 99 and 7 PPER 159.

78. However, See Lawrence Co. Housing Auth., 5 PPER 40.

of adverse impact on the unit will undoubtedly serve as justification to the employer to subcontract work.*(79)*

§6.8.5 Bypassing the Union

The PLRB has considered several cases in which the public employer has sent letters or communications to union members in the course of collective bargaining. Such conduct can constitute an unfair labor practice under the heading ''refusal to bargain''. The unions object to direct contact with their members since the union membership must rely upon unity of that membership to secure its ends. If the public employer is able to create or encourage a division of opinion in the union, that division can work to that interest of the employer and against the direction in which the union leadership would lead. The lead case in this area in which an unfair labor practice charge was found is *Baldwin-Whitehall School District*, 2 PPER 165. That case contains the following justification for finding of refusal to bargain.

> ''To afford public employes the full benefit and protection of collective bargaining rights guaranteed to them by the act, it is necessary to insulate them from any efforts by the public employer, direct or indirect, to undercut the authority of the employes' duly selected representative, or fragment the unity of the bargaining unit. Any such action by the public employer is considered to be an unfair practice.''

In the *Baldwin-Whitehall* case, the parties had been negotiating and when the union rejected a school district offer, the school district negotiator indicated that the union need not provide a counter offer as the school district was going directly to employes. The letter which was mailed out did not accurately describe the course of bargaining. Inaccuracies in the letter and an intent to undermine the union seemed to be the touchstones in finding an unfair labor practice.*(80)*

On the other hand where the facts are not misrepresented and where the letter is not coercive, there is no refusal to bargain.

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79. Boro. of Westview, 6 PPER 131. See also Community Col. of Philadelphia, 7 PPER 157.

80. See Forest Hills S.D., 2 PPER 202; West Chester S.Bd., 3 PPER 75; Dallastown Area S.D., 6 PPER 243; 7 PPER 245.

> "...The fact that an employer chooses to inform employes of the status of negotiations or proposals previously made to the union, its version of a breakdown in negotiations will not alone establish a failure to bargain in good faith. See *Proctor and Gamble, Inc.*, 160 NLRB No. 36."(*81*)

Running totally contrary to these decisions is *N. Bedford S.D.*, 7 PPER 195, wherein the PLRB held on different facts, precisely as it had held in the *Baldwin-Whitehall S.D.* case, 2 PPER 165.(*82*) Whether these cases are "flukes" or a change in policy by the PLRB is a matter that time will tell.

The NLRB has held that it is a refusal to bargain to deny union representation at disciplinary meetings. The PLRB has not followed this rule.(*83*)

§6.9 Good Faith Bargaining

The duty to bargain is spelled out in Section 701 of PERA.

> "Section 701 Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employes to meet at reasonable times and to confer in good faith with respect to wages, hours and other terms and conditions of employment, for the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached but such obligation does not compel either party to agree to a proposal or require the making of a concession."(*84*)

Section 1201 (a) (5) and 1201 (b) (3) require that both parties, employer and employe representative, bargain in good faith. Just when one is bargaining in good faith is an extremely complicated issue that has been the subject of many, many cases before the NLRB. The PLRB has dealt with this on a number of occasions, but it is only beginning to touch upon the complexities of what is good faith bargaining. Following is a brief review of the cases that have come before the PLRB.

Before one need bargain there must be a union majority. Under PLRB decisions, this is usually not a problem as the

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81. **Williamsport Education Association**, 6 PPER 57, 59. See also **City of Lancaster**, 2 PPER 132; **Brownsville A.S.D.**, 2 PPER 197; **Port Allegany S.D.**, 7 PPER 30; **Portage Area S.D.**, 7 PPER 325.

82. See **Baldwin-Whitehall** quotation. See also **Muhlenberg Twp.**, 7 PPER 286.

83. **Com. of Pa.**, 4 PPER 74; **Com. of Pa.**, 5 PPER 80. For apparent contradiction, see **Warwick Bd. of Sch. Dir.**, 4 PPER 146.

84. 43 P.S. §1101.701.

PLRB will not require bargaining until it has certified the collective bargaining agent. However, if it has certified the collective bargaining agent, the employer is obliged to bargain even though there is a challenge to that certification pending.(*85*) During the course of bargaining, it sometimes happens that employes become disillusioned with the union or quit the employer and leave him with an employe work complement that he knows does not want the union. Knowledge that employes do not want to be represented by a union is not enough to justify a refusal to bargain. The PLRB has held the decertification petition must be filed under Section 607, 43 P.S. §1101.607.(*86*) The fact that an unfair labor practice charge is pending does not justify an employer in refusing to bargain with the representative of his employes.(*87*) One cannot insist upon bargaining "in the sunshine" and to do so has been held to be an unfair labor practice.(*88*)

Minor incidents in the course of bargaining do not constitute a refusal to negotiate in good faith. In *Penn Delco S.D.*, 2 PPER 30, the employer bargainers intruded into a union caucus and sought to explain the contract proposals presented to the union. The PLRB did not regard this as so improper as to sustain a refusal to bargain charge. Neither is it a refusal to bargain to reject tentative settlements so long as it has been understood that the parties' acceptance of the offer was not a final acceptance.(*89*)

Unjustified and prolonged delay may very well constitute a refusal to bargain.(*90*)

The employer did not breach its duty to bargain when the existing contract had a year to run. In *Lower Paxton Twp.*, 8 PPER 67, the collective bargaining agreement contained a provision automatically renewing the agreement for one year unless either party gave notice of intent to follow the statutory bargaining requirements. The union failed to give timely notice and the PLRB concluded that the contract was renewed for one

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85. **Monogahela Valley Hospital**, 3 PPER 372.

86. **Houtzdale Municipal Auth.**, 6 PPER 283.

87. **Phoenixville Area S.D.**, 4 PPER 50.

88. **City of Bethlehem**, 3 PPER 102.

89. **Appalachia Intermediate Unit**, 6 PPER 125; **Northwest Tri-County Intermediate Unit, No. 5**, 6 PPER 285.

90. **Reynolds S.D.**, 3 PPER 228; **Phoenixville Area S.D.**, 4 PPER 50.

year and that the employer was under no obligation to bargain. Neither is an employer obliged to open a contract that appears to be complete so as to allow the union to add a supplement to that contract.(*91*)

Arguments during the course of negotiations generally do not add up to refusals to bargain. In *Duquesne Education Association*, 3 PPER 52, the parties had agreed to discuss noneconomic items first and it was held not to be an unfair labor practice for the union to insist upon this procedure and decline to make a counter-offer. In *Bristol Township Ed. Assoc.*, 3 PPER 120, the union tried to bargain on terms other than those subject to the reopener. The board did not find the union so locked into the request on these other matters as to justify a finding of refusal to bargain. Arguments over an interim grievance procedure in the *Delaware County* case, 3 PPER 278, and an employer's refusal to pay the union's negotiators or in the alternative, to negotiate on working time in *Highland Sewer and Water Auth.*, 4 PPER 116, did not constitute an unlawful refusal to bargain.

Scranton Redevelopment Authority, 1 PPER 122, dealt with a situation where the employer agreed to a contract with the condition that "HUD must first approve the wage increases, all of the terms of the collective bargaining contract and its duration". Such approval was not forthcoming. The PLRB refused to find violations of 1201 (a) (5) because of the contractual and legal restrictions on the employer by the Department of Housing and Urban Development,than principally financed the authority.

If one reads the definition of the duty to bargain set forth above, it is apparent that neither party is compelled to agree to any terms. The compulsion is to bargain in good faith. However, what constitutes bargaining in good faith is a difficult question. It is lawful to engage in hard bargaining.(*92*) Nevertheless, it is unlawful to bargain on the basis of "take it or leave it."(*93*)

The Commonwealth Court was presented with the problem of what is "good faith bargaining" in *PLRB v. Commonwealth*

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91. Union S.D., 8 PPER 7.

92. State Liquor Control Board, 6 PPER 335 N.; Strabane Township, 5 PPER 85; Bellefonte S.D., 3 PPER 26; Berks Co. Commissioners, 8 PPER 4.

93. Boro. of Berwick, 3 PPER 183.

of Pennsylvania, 8 PPER 34, ____ Pa. Cmwlth. ____, 367 A.2d 805 (1977). The commonwealth had earlier negotiated a contract with a large public employe union. On beginning negotiations with the complaining union, the commonwealth announced that it would grant no more than a 3.5% increase effective July 1, 1975. Thereafter, it showed a reluctance to deviate greatly from its initial "package offer" although it did agree to some modifications. The court quoted and agreed with the PLRB's language:

> "While intransigence as to a 'package' collective bargaining offer may constitute an unfair practice, refusal to compromise as to one part of a collective bargaining proposal where concessions have been made on other aspects of the agreement is not a per se violation of Section 1201 (a) (5) of the act."

The passage of years will undoubtedly add to the law of "good faith bargaining" in the public sector.

§7. Meet and Discuss

§7.1 Preliminary Observations

"Meet and discuss" is not bargaining. It is a concept unique to PERA. There is no identical concept in NLRB practice, although permissive subjects of bargaining bear some relationship to meet and discuss.

Meet and discuss is defined as follows:

> (17) "Meet and discuss" means the obligation of a public employer upon request to meet at reasonable times and discuss recommendations submitted by representatives of of public employes: Provided, That any decisions or determinations on matters so discussed shall remain with the public employer and be deemed final on any issue or issues raised.*(1)*

There are two instances when an employer is obliged to meet and discuss. One is in talking to employes about matters of inherent managerial policy, when the employer is not required to bargain. The section of the act setting forth this requirement appears below.

> Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include

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1. 43 P.S. §1101.301 (17).

> but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. **Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employe representatives.** (*2*)

The other instance when an employer is required to meet and discuss is when it is dealing with first-level supervisors. This obligation is stated in the following section:

> Public employers shall not be required to bargain with units of first level supervisors or their representatives **but shall be required to meet and discuss with first level supervisors or their representatives, on matters deemed to be bargainable for other public employes covered by this act.** (*3*)

Finally, it should be noted that there is an express statutory requirement making failure to meet and discuss an unfair labor practice for both the public employer and the employe organization. (*4*)

§7.2 First Level Supervisors

The private employer is not obliged to bargain with supervisors under the provisions of NLMRA. This result obtains from the exclusion of supervisors from the term employe". (*5*) If persons are not employes, they do not have the protection of NLMRA. As noted in the preceding section, Pennsylvania public employers do have the duty to meet and discuss with first level supervisors about matters deemed to be bargainable for other public employes covered by this act. The PLRB has established units of supervisors to enable the public employer and its public employes to satisfy this obligation. (*6*)

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2. 43 P.S. §1101.702, emphasis added.
3. 43 P.S. §1101.704, emphasis added.
4. 43 P.S. §1101.201 (a) (9) and §1101.1201 (b) (9).
5. 29 USCA §152 (3).
6. 43 P.S. §1101.604 (5).

Note, that the duty to meet and discuss with supervisors is limited to matters "bargainable" with other employes. If Section 704 is read literally, the supervisory meet and discuss requirement does not extend beyond "wages, hours and terms and conditions of employment", leaving supervisors no right to talk about matters of "inherent managerial policy" as is the right of rank-and-file workers. The cases have not decided if "supervisory meet and discuss" is or is not more limited than that of the rank-and-file. The question will likely not create a problem since most public employers will listen to first level supervisors' ideas about policy matters. The suggestions needn't be followed, but the wise employer listens.

Decisions or determinations in meet and discuss "shall remain with the public employer and be deemed final on any issue or issues raised."(*7*) The employer was not obliged to reduce its decisions or determinations to writing.(*8*) If the employer did reduce its decisions to writing, it was not bound to comply with them as though it were contractually bound, particularly when it had disavowed any contractual intent.(*9*) Written meet and discuss memorandums do not seem wise. However, if one should exist, its terms may be changed by "meeting and discussing" the change before implementation thereof.(*10*)

§7.3 Inherent Managerial Policy

Meet and discuss for rank and file occurs at times somewhat different that that for bargaining. During the course of negotiating contracts, meet and discuss items undoubtedly will come forward. The public employer may agree to incorporate some of the items of inherent managerial policy into the contract. Others may be rejected and directed off the table as nonbargainable items.(*11*)

Union demands that have been held to be matters of inherent managerial policy are treated in a fashion near identical to permissive subjects of bargaining under the federal act. Thus, the employer can bargain on these subjects if he

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7. 43 P.S. §1101.301 (17).

8. **SEPTA**, 7 PPER 127.

9. **Commonwealth of Pennsylvania**, 6 PPER 176.

10. However, see Section 7.4.

11. **Williamsport Education Association**, 6 PPER 57.

elects to do so. If agreement is reached, the PLRB has held it binding. On the other hand, an employe organization cannot bargain to impasse on matters of inherent managerial policy. To do so is an unlawful refusal to bargain. The employer, on the other hand, has a perfect right to demand that matters of inherent managerial policy be removed from the bargaining table before it continues with its discussions of wages and other properly bargainable subjects.(*12*)

In the period between negotiating the contract, there are frequent opportunities for meet and discuss sessions, and one case held it an unfair practice to refuse to meet and discuss **between** contract negotiations.(*13*) Contracts will often provide for periodic meetings between representatives of the public employer and representatives of employes for the purpose of meet and discuss. The unions urge this provision and frequently try to get in meet and discuss that which they have failed to get in bargaining.

Changes in the public employer's operations which impact on the employment situation can trigger the necessity for meet and discuss. One case says that the employer's duty to meet and discuss arises only after request by the union.(*14*) This is an oversimplification. Unilateral action affecting employes may raise the duty to advise the union of the contemplated change so as to give opportunity for meet and discuss. Unilateral reduction of several professional employes' work year was a violation of the duty to meet and discuss, that was not cured by an offer to meet and discuss **after** the change was made. (*15*) Giving four days advance notice of a contemplated reorganization plan was improper as it gave the union no opportunity to adequately respond to the proposed changes.(*16*) On the other hand, no notice of impending layoffs was required in *School District of the City of Erie*, 7 PPER 36, as the union had had adequate indication of financial problems and could not reasonably plead lack of notice of the impending layoffs. The decision in *E. York School District*, 3 PPER 79, is consistent

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12. Littlestown Area Sch. District, 3 PPER 383; Richland Sch. Dist., 4 PPER 2; Williamsport Ed. Assn., 6 PPER 57 and Dallastown Area Sch. Dist., 7 PPER 1 and 7 PPER 173. See Section 7.4 as to the binding nature of "meet and discuss."

13. Brownsville Area S.D., 3 PPER 233.

14. Scranton Redevelopment Authority, 1 PPER 108.

15. Upper Merion Area School District, 2 PPER 86.

16. Aliquippa School District, 3 PPER 327.

with this in its conclusion that a union cannot sit idly by after having been told of contemplated changes and then complain violation of a meet and discuss duty when the changes are made.

The sense that can be made from these decisions is that meet and discuss requires reasonableness on the part of both parties. The public employer cannot secretly begin a chain of events that will adversely impact on a large number of employes and when the decision has become irreversible, notify the union of its plans. On the other hand, the union cannot sit by as all indications point toward one or several courses for the public employer, and then allege violation of meet and discuss provisions when the employer takes an easily anticipated course of action. The nature of the change, its causes, the necessity for quick action, the effect on the public, the effect on employes will all bear on future decisions like those cited above and the rules will likely develop on a case-by-case basis.

The PLRB and the courts have discussed the nature of the public employers obligation to meet and discuss. In an early case, the PLRB noted that the definition of meet and discuss set forth in Section 301 (17) does not include the requirement that the employer meet and discuss in good faith. The good faith requirement is part of the bargaining obligation stated in Section 701 of PERA.(*17*) This same concept was carried forward in somewhat different words in *Brownsville Area School District*, 3 PPER 233. The PLRB stated:

> "The important difference here is that nothing arising out of meet and discuss sessions is binding on the employer. It need only do what the act states - 'meet and discuss'. No affirmative action on the part of the employer can be required."(*18*)

The reasoning of PLRB was adopted by the Commonwealth Court in *Commonwealth v. APSCUF*, 7 PPER 135, ____ Pa. Cmwlth. ____, 355 A.2d 853 (1976). Despite urgings by the union, the Commonwealth Court rejected the idea that meet and discuss required the same "good faith" that was required for bargaining. The court described its understanding of meet and discuss as follows:

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17. City of Erie School District, 2 PPER 17.

18. See also Aliquippa School District, 3 PPER 327; Commonwealth of Pennsylvania, 6 PPER 51.

> "The meet and discuss sessions exist as a device to permit input or recommendations from the employes on policy matters affecting wages, hours and terms and conditions of employment so as to assist the public employer in ultimately making its discretionary resolution or disposition of the issues in question. As already noted, we agree that the parties cannot meet and discuss in bad faith, but that does not mean that good faith, in the sense that the term applies to collective bargaining, should be required in meet and discuss sessions. In other words, meet and discuss sessions were not intended by the Legislature to provide a forum for negotiating, compromising or amending the existing collective bargaining agreement, but rather as a means for solving labor problems between public employers and their employes under their agreement and as a means to promote an orderly and constructive relationship between the parties."

§7.4 Right to Make Changes

One final matter deserves mention. It is noted that there are occasional agreements on meet and discuss matters.(*19*) When agreement is so reached, is the public employer bound? The very definition of meet and discuss would seem to preclude binding agreement. In one case, the PLRB held that the employer was not bound by a written memoranda of agreement in meet and discuss.(*20*) In that case, there was an express provision in the agreement with supervisors that it would not be binding. There is a good argument for the conclusion that it is against public policy to bind the public employer in matters of "inherent managerial policy".

The Commonweatlh Court appears to have decided that when a meet and discuss item of inherent managerial policy has been negotiated into a contract, it will bind the employer. In *Scranton School Board v. Scranton Federation of Teachers*, 8 PPER 55, ____ Pa. Cmwlth. ____, 365 A.2d 1339 (1976), the Commonwealth Court considered the school district's agreement that "those appointed to the position of 'department head' for three consecutive years would hold their positions on a permanent basis subject only to removal for good and sufficient cause". Thereafter, the position department head

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19. Williamsport Education Association, 6 PPER 57.

20. Commonwealth of Pennsylvania, 6 PPER 176.

was eliminated for financial reasons and the union grieved. The issue went to arbitration and the arbitrator sustained the union's grievance. On appeal to the Commonwealth Court the school district relied in part on Section 702 excepting inherent managerial policy from bargaining.*(21)* The court rejected this argument and said:

> "Appellant, while not **required** according to Section 702, 43 P.S. §1101.702, to negotiate regarding matters of inherent managerial rights, chose to do so. Thus, in the absence of contrary positive legislation, appellant is bound by the terms of Article 44 (of the collective bargaining agreement)."

If the matter in dispute were a matter of permissive bargaining under NLMRA, the court would certainly be correct. However, the definition of meet and discuss provides:

> "(17) 'Meet and discuss' means the obligation of a public employer upon request to meet as reasonable times and discuss recommendations submitted by representatives of public employes: **Provided, that any decisions or determinations on matters so discussed shall remain with the public employer and be deemed final on any issue or issues raised.**"*(22)*

This section appears to preclude final, binding agreement on any meet and discuss item which is different from "permissive bargaining" under federal law. A final conclusion as to the binding nature of meet and discuss and matters of "inherent managerial policy" will have to await future decisions.

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21. 43 P.S. §1101.702.
22. 43 P.S. §1101.301 (17).

§8. Unfair Practices

§8.1 Introduction

As previously noted,PERA has established a set of offenses designated as "unfair practices" that are designed to protect and preserve the bargaining relationship permitted by PERA. Several PERA unfair practices are nearly identical to the unfair labor practices established by NLMRA. Both acts prohibit unlawful refusals to bargain.(*1*) Both acts prohibit unlawful restraint and coercion of employes in the exercise of their rights to participate in or to decline participation in union or other concerted activity.(*2*) Similarly, there are provisions against domination and interference with labor organizations, provisions against discrimination against employes because they do or do not join the union, etc., and against discrimination for use of PLRB or NLRB procedures.(*3*)

PERA contains certain unfair practices not present in the NLMRA. PERA makes a separate unfair practice of refusal to reduce a collective bargaining contract to writing, whereas, the NLRB has reached the same conclusion, but by regarding this as a refusal to bargain.(*4*) Violation of PLRB rules governing

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1. 43 P.S. §1101.1201 (a) (5); 29 U.S.C.A. §158 (a) (5).
2. 43 P.S. §1101.1201 (a) (1); 29 U.S.C.A. §158 (a) (1).
3. 43 P.S. §1101.1201 (a) (2) (3) and (4); 29 U.S.C.A. §158 (a) (2) (3) and (4).
4. 43 P.S. §1101.1201 (a) (6).

elections, refusing to comply with arbitration awards and refusal to meet and discuss are all unfair practices unique to PERA.(*5*)

The foregoing are public **employer** unfair practices. PERA contains a list of unfair practices that **employe** organizations, their agents or representatives or public employes are prohibited from doing. To a great extent, these follow the employer unfair practices. Unions may not interfere with employes' rights to engage in or refrain from engaging in union or other concerted activity; nor may a union refuse to bargain, violate PLRB election rules, refuse to sign a completed collective bargaining agreement, refuse to meet and discuss or refuse to comply with an arbitration award.(*6*) However, unions are further prohibited from interfering with the public employer's choice of his bargaining and grievance representative, and from certain specified "boycott" activities.(*7*)

Not all of the enumerated unfair practices have been the subject of reported litigation. Those that are reported are discussed in this section or in other sections such as that on bargaining, arbitration or meet and discuss. This chapter is principally devoted to unfair labor practices that arise from discrimination because of union activity or from interference with employes' rights because they have engaged in union or concerted activity, or have refrained from doing so. Also mentioned are the related subjects: PLRB deferral to arbitration, the PERA "conflict of interest provision" and a discussion of maintenance of membership.

§8.2 Discrimination

§8.2.1 Introduction

PERA prohibits employment discrimination "to encourage or discourage membership in any employe organization".(*8*) The unfair practice consists of some detrimental act like a discharge or suspension or transfer to an undesirable shift. However, it also requires that the act encourage or discourage union membership. The cited section is not designed to replace the grievance procedure or to correct every real or imagined wrong in the work place.

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5. 43 P.S. §1101.1201 (a) (7) (8) and (9).
6. 43 P.S. §1101.1201 (b) (1) (3) (4) (5) (8) and (9).
7. 43 P.S. §1101.1201 (b) (2) (6) and (7).
8. 43 P.S. §1101.1201 (a) (3).

> Although the act provided, for the first time, the absolute right of public employes to bargain collectively and to use other well established labor relations procedures, the act does not provide a forum for the airing of all grievances and complaints of employes who feel that they have been poorly treated by their public employers. Rather, the act sets forth various specific situations which shall be considered unfair practices, and which shall be redressable by the procedures set forth within the act. Simply stated, unfair practices are practices by either the collective bargaining representatives or public employers which would thwart the spirit or procedures of the act. It is equally clear that each and every action of an employer with regard to employes cannot be considered an unfair practice.(*9*)

It should be noted that motive is not an express part of violation of Section 1201 (a) (3), 43 P.S. §1101.1201 (a) (3). In the federal jurisdiction, the U.S. Supreme Court has held employer conduct to be an unfair practice where the conduct "is so 'inherently destructive of employe interests' that it may be deemed prescribed without need for proof of an underlying improper motive".(*10*) Whether the concepts of the cited cases are the law of Pennsylvania public sector labor relations is uncertain.

The PLRB has cited *Radio Officers* in several cases but research has not revealed adoption of the U.S. Supreme Court ideas by the Pennsylvania appellate courts.(*11*)

The PLRB cases have been primarily concerned with discriminatory action against employes motivated by a desire to discourage unionism. In order to establish that an employer has discriminated against an employe for union activity, several factors must be present and have been considered in one PLRB case after another. The essentials are generally:

1. Union activity or employer belief that an employe is active in a union.
2. Employer knowledge of union activity.

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9. **City of Easton**, 3 PPER 3, 4.

10. **NLRB v. Great Dane Trailers, Inc.**, 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967); **Radio Officers' Union v. NLRB**, 347 U.S. 17, 74 S.Ct. 323, 98 L.Ed. 455 (1954).

11. **Indiana Co.**, 6 PPER 189; **Charles Cole Memorial Hosp.**, 3 PPER 286.

3. Anti-union animus — an uncertain concept that embodies motivation to still employe unionism.

4. Discrimination — the harmful effect on the employe or employes.

The facts of individual cases take many forms. Following are some examples illustrating how the foregoing principles may be applied.

Example I: An employer who fires an employe **for union activity** is guilty of an unfair labor practice even though the employe has had **no** dealings with the union. The employer's "mistake" regarding union activity does not excuse his action.

Example II: An employer who knows nothing of an employe's pro-union activities does not commit an unfair practice when he fires that employe since his **ignorance of the union activity** precludes his having fired the employe for that activity.

Example III: An employer who knows of union activity of an employe but who fires him **for other causes** has committed no unfair practice. The difficulty in a case such as this is to establish that the employer had justification for the discharge and the reasonableness of the discharge; the PLRB may well infer a discriminatory motive from knowledge of the union activity and from employer conduct showing a tendency to act unlawfully to thwart union organization.

As there are certain essential elements to constitute an unfair practice, so there may be justification for what might otherwise be unlawful. Discharge of a very poor employe is often justified. Discharge of an employe long after (or before) the union activity relied upon to show anti-union motivation can create doubt as to motive. Rather slight union activity raises a question as to whether that caused the discharge. Equal impact of an alleged discriminatory policy on union and nonunion employes creates doubt as to the purpose of the policy.

The essential elements of discrimination for union activity and defenses to this charge are considered below.

§8.2.2 Nature of Harm

Discrimination caused by union activity can take many forms. Most of the cases involve discharges. However, the PLRB has found or considered discrimination involving failure to promote(*12*), changes in work schedules(*13*), suspensions(*14*), transfer of teachers from one grade to another(*15*), refusal to accept employes who bid on positions(*16*) and forced transfers and forced resignation.(*17*)

The foregoing is merely representative and far from all inclusive. Nearly any detrimental or undesired action can form the basis for discrimination to discourage union activity.

§8.2.3 Union Activity

Discrimination against employes because they have engaged in union activity, most frequently has presented some element of union activity. What activity and how much activity and how noticeable the activity all have bearing on whether the employer was motivated to fire the employe for the union activity or for some other reason.

Where there has been no proof of recent union activity, the PLRB has not found unfair practices.(*18*) Similarly, where union activity is concealed, the board has declined to find discriminatory activity.(*19*)

Comparatively slight union activity has caused the PLRB to question that activity as being the cause of discrimination. Slight union activity may still be the cause of a discharge, but it is one more element to consider in making a finding.(*20*)

Union activities coupled with other factors were discussed in the following cases as being sufficient to justify the belief that there was an unfair labor practice. *Reading Model Cities Agency*, 3 PPER 33 (securing authorization cards and

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12. Com. of Pennsylvania, 5 PPER 100.
13. Cornwall-Lebanon S.D., 3 PPER 49.
14. Presbyterian Univ. Hospital, 4 PPER 70.
15. Garnet Valley S.D., 5 PPER 91.
16. Chartiers Valley S.Bd., 4 PPER 90.
17. Schuylkill Co., 6 PPER 15.
18. St. Joseph Hospital (Pittsburgh), 3 PPER 345; Montefiore Hospital, 5 PPER 98.
19. Muhlenberg Twp. S.D., 3 PPER 180; St. Christopher's Hospital, 5 PPER 60.
20. Somerset Co. Com., 2 PPER 60, 63; Washington Co., 3 PPER 270, 272; Defender Assn. of Phila., 6 PPER 88 and 7 PPER 309; Indiana Co. Com., 6 PPER 189.

explaining the advantages of unionization); *York Hosp.*, C.P. York Co., 3 PPER 313 (passing out authorization cards); *Washington Hosp.*, 3 PPER 69 (concerted activity, preparation and formulation of complaints for other employes in a nonunion background); *Co. of Delaware*, 4 PPER 38 (no unfair practice despite union activity because there was no "animus").

Several cases have dealt with discharges for union activity prohibited or otherwise unprotected by PERA. In both instances, the unprotected activity was an unlawful strike and work stoppage.(*21*) Illegal activities are not protected even though in some way tied to union activity. NLRB precedent will undoubtedly provide additional instances of unprotected union activity.(*22*)

§8.2.4 Concerted Activity v. Union Activity

Concerted activity and union activity are two closely related concepts in the labor relations sense. The starting point for this proposition is Section 401 of PERA:

> "Section 401. In shall be lawful for public employes to organize, form, join, or assist **in employe organization** or to engage in lawful **concerted** activities for the purpose of collective bargaining or other mutual aid and protection...."(*23*)

It is then an unfair practice and employers are prohibited from:

> "(1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act,
>
> (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization."(*24*)

Note the Section 1201 (a) (3) makes express reference to discouraging membership in an employe organization. If there

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21. **Pleasant Valley S.D.**, C.P., Monroe Co., 5 PPER 26; **Baldwin-Whitehall S.D.**, 3 PPER 40.

22. See **NLRB v. Local Union No. 1229 (IBEW) (Jefferson Standard)**, 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 196 (1953).

23. 43 P.S. §1201.401. Emphasis added.

24. 43 P.S. §1101.1201 (a) (1) and (3).

is no employe organization in existence or contemplation, that section is not violated. On the other hand, Section 1201 (a) (1) refers to interference with rights guaranteed by Article IV, which article guarantees the right to concerted activity. The concerted activity contemplated is banding together of employes to complain about problems in the work place, like cold work rooms or dirty toilets or late paychecks. NLRB cases tell of many other items covered by this term. However, Pennsylvania cases raise some questions as to application of these precedents.

The guarantee in PERA is not unlike that contained in the Pennsylvania Labor Relations Act, to the effect that employes have the right "to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection."(25)

The Supreme Court has interpreted the provision in PLRA in *PLRB v. Elk Motor Sales Company*, 388 Pa. 173, 130 A.2d 501 (1957). In that case, a group of employes met and selected two employes to talk to their boss about paid vacation and holidays. The men met with their employer and he granted their request. He also suggested that they might meet periodically and settle differences and any grievances that they might have. About six months later, one of the employes who had met with his employer talked to his fellow workers about forming a "club" that might meet with their employer "for more friendly relations and settle any grievances that we may have". Twelve of 15 fellow workers agreed to join this club. When the employe talked to his employer, the employer did not take kindly to the suggestion and the promoter of the "club" found himself fired. The Supreme Court ruled that this was not concerted activity in that there was no proof of the existence of a labor organization and that the employe was not discharged because he had formed or joined a "labor organization".

In the federal sector, the NLRB will consider activity as concerted and protected if two or more employes join together in a group for mutual protection, whether it be a "one shot deal" or the ultimate formation of a labor union. The PLRB seemed to be following federal precedent. An employe who compiled a list of various complaints of employes in a hospital

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25. 43 P.S. §211.5.

and circulated it for employe initials, was regarded as engaging in protected, concerted activities, although there was no union on the scene.(*26*) An employe who voiced several complaints at a statewide meeting of administrative personnel concerning disparity in benefits, was regarded by the PLRB as being engaged in protected, concerted activity. The PLRB stated:

> "It is clear to the board that his actions were not only concerted activity for the benefit of auditors, but are also protected under Article IV of act. Mr. Rizzo's actions were no different than if he had urged auditors to form or join a union. Clearly he would personally benefit by unionization, but the entire complement of auditors would also benefit by the formation of a union and that activity falls within the protection afforded by Article IV of the act."(*27*)

Nevertheless, the most recent case on the subject deals with an employe who protested a change in working hours. Several witnesses testified that she was acting on their behalf when she did this. However, there was no activity beyond this point. The board described this as a "one shot deal". It cited the *Elk Motor Sales* case and it dismissed the case on the basis of there not having been requisite concerted activity. The most troublesome lack, was that cited in *Elk Motor Sales,* the lack of any "employe organization...even in an embryo status".(*28*) Employers would do well to treat carefully with "concerted activity". The law in this area may be open to change.

§8.2.5 Knowledge of Union Activity

One who does not know of union activity cannot well be said to have fired another for that activity. In *Shive v. Bellefonte A. Bd. of S.D.*, 4 PPER 72, 12 Pa. Cmwlth. 543, 317 A.2d 311 (1974), a picture of an employe carrying a picket sign appeared in a newspaper. The Commonwealth Court refused to accept this as evidence of the employer's knowledge of that employe's union activity. Knowledge was a critical factor in finding the discharge of the employe to be unlawful.(*29*)

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26. Washington Hospital, 3 PPER 363.

27. Commonwealth of Pennsylvania, 5 PPER 45. See also Montefiore Hospital, 5 PPER 98.

28. Lehigh Co., 5 PPER 111. See also Little Neighborhood Center, 7 PPER 27.

29. See also PLRB v. Atlas Casket Co., 370 Pa. 5, 87 A.2d 645 (1952), and Pisarev v. Amalgamated Meat Cutters & Butcher Workmen, Local No. 195, 345 Pa. 123, 27 A.2d 52 (1942).

The PLRB has held:

> "It is fundamental that knowledge by an employer of a dischargee's union activity is a prerequisite to a finding that the discharge was made for that reason...."(*30*)

Where no evidence of knowledge of the employe's union activity is presented, the PLRB has consistently declined to find unlawful discrimination.(*31*)

Several cases have dealt with situations where union activity has occurred after the decision to terminate.(*32*) It is obvious that such union activity did not cause the termination and in one case the PLRB noted:

> "An employe cannot protect himself from discharge merely by engaging in union activities at the time of his discharge."(*33*)

Often, knowledge of union activity is provided by direct statements to the employer or by other direct evidence of union activity.(*34*)

However, proof of knowledge is not always so easy and in *St. Joseph Hosp.*, 2 PPER 83, the PLRB relied on what is referred to as the "small plant" rule to infer knowledge of union activity. In summary, the small plant rule stands for the proposition that in small plants, one may infer knowledge of union activity since everyone knows the business of other employes. The court credited with fathering this rule has questioned the wisdom of the rule.(*35*) Similarly, when the St. Joseph Hosp. case was appealed to the Commonwealth Court, Judge Blatt described the proof of employer knowledge, based on the small plant rule, as "certainly less than convincing".(*36*)

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30. **Westmoreland Co. Com. Col.**, 3 PPER 311.

31. **Somerset Co. Com.**, 2 PPER 60, 63; **Monongahela Valley Hosp.**, 3 PPER 93; **Muhlenberg Twp. S.D.**, 3 PPER 180; **Limerick Twp.**, 3 PPER 207; **W. Pennsylvania Hosp.**, 3 PPER 221; **Centennial S.D.**, 3 PPER 234; **Westmoreland Co. Com.**, 3 PPER 311; **Schuylkill Co.**, 6 PPER 15; **First Judicial Dist.**, 6 PPER 53; **Middletown Boro.**, 6 PPER 183; **City of Philadelphia**, 8 PPER 78.

32. **Borough of Wilkinsburg**, 3 PPER 309.

33. **Middletown Twp.**, 3 PPER 9.

34. **Mon Valley Sewage Auth.**, 3 PPER 216; **Charles Cole Memorial Hosp.**, 3 PPER 286; **Washington Hosp.**, 3 PPER 363.

35. **NLRB v. Antill, Inc.**, 358 F.2d 880, 53 LC ¶11,182 CA-1 (1966).

36. **St. Joseph Hosp. v. PLRB**, 6 PPER 32, 16 Pa. Cmwlth. 533, 330 A.2d 561 (1974).

On further appeal, the Supreme Court reversed the Commonwealth Court and concluded that knowledge was present, and that the PLRB inferences had been correct. The Supreme Court reasoned that since the hospital unit in which the two nurses worked was a small one and since the supervisor of nurses who discharged the two women had direct contact with the supervisor of the unit, "any knowledgeable administrator would necessarily have known which of the people on a staff of this size were engaged in union organizing activities." Coloring the court's thinking was testimony to the effect that the hospital had been watching this unit of employes rather closely since the beginning of the organizational campaign.(*37*) There was no mention of the small plant rule in the decision and it is questionable as to how far the Supreme Court would be willing to go beyond the facts of this particular case. *St. Joseph Hospital* does show the difficulties presented to the parties when a PLRB finding is based on inferences.

§8.2.6 Anti-Union Animus

Anti-union animus is an uncertain, varying element of unlawful discrimination that is close kin to *mens rea* in criminal law. Anti-union animus may be described as an inclination to take unlawful action in order to discourage union activity. In some cases the employer admits that he acted in order to discourage union activity.(*38*) Most frequently, the employer is not so frank and the PLRB looks to surrounding circumstances to see if there is the requisite inclination to break the law as to justify a finding of unfair labor practice. The Supreme Court has stated:

> "Essential to the existence of a §6(1) (c) unfair labor practice (29 P.S. §211.6(1) (c)) is a particular motive on the employer's part — an 'anti-union animus'. The motive creates the offense."(*39*)

The Supreme Court's observation emphasizes the importance of establishing the anti-union animus. Following are examples of what is or what is not necessary animus.

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37. St. Joseph's Hospital v. PLRB, ____ Pa. ____, 373 A.2d 1069 (1977).

38. Penn Twp., 6 PPER 187.

39. PLRB v. Ficon, Inc., 434 Pa. 383, 388; 254 A.2d 3 (1967).

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As one would suppose, a failure to find any anti-union animus has resulted in dismissal of PLRB charges. (*40*) Failure to oppose the original union organizational campaign was held to be an indication of no anti-union animus.

Anti-union animus must be more than general animosity to a union.(*41*) In *St. Joseph Hosp.*, 2 PPER 83, the only evidence of anti-union animus was the directoress of nurses disagreement with the need for a union. The Commonwealth Court reversed the PLRB and held that mere opposition to a union was not a corrupt motive and that "...inclination to inhibit **unlawfully** the organizing...." was necessary to sustain the unfair labor practice.(*42*) The Supreme Court reversed the decision of the Commonwealth Court. The Supreme Court seemed most impressed by the fact that the hospital seemed to deviate from its prior practice in having immediately terminated the two nurses whose insubordination was cast in doubt by the directoress of nurses' own statement.(*43*)

The fact that other union members were promoted or otherwise favored at a time when alleged animus is claimed to exist, contradicts improper motive.(*44*)

If an employe is terminated long after the alleged union activity is supposed to have taken place, anti-union motive tends to be rebutted.(*45*)

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40. PLRB v. Kaufmann Dept. Store, 345 Pa. 398, 29 A.2d 90 (1942); Union Tr. Co. of Pittsburgh's Petition, 342 Pa. 456, 20 A.2d 779 (1941); Purchase Line S.D., 3 PPER 45; Limerick Twp. S.D., 3 PPER 207; Pa. Historical and Museum Com., 3 PPER 196; Owen J. Roberts S.D., 3 PPER 227; Centennial S.D., 3 PPER 234; Westmoreland Co. Com. Col., 3 PPER 311; Com. of Pennsylvania, 4 PPER 54; Towanda A.S.D., 8 PPER 117; Fayette Co. Commissioners, 8 PPER 110; Schuylkill Co., 6 PPER 15; Com. of Pennsylvania, 6 PPER 38; and First Judicial Dist., 6 PPER 53.

41. Montefiore Hosp., 5 PPER 98.

42. St. Joseph Hosp., 6 PPER 32, 16 Pa. Cmwlth. 533, 330 A.2d 561 (1974).

43. St. Joseph's Hospital v. PLRB, ____ Pa. ____, 373 A.2d 1069 (1977).

44. Allentown Hosp., 3 PPER 14; Chartiers Valley S.D., 4 PPER 90; Com. of Pennsylvania, 6 PPER 38.

45. PLRB v. Sansom House Enterprises, Inc., 378 Pa. 385, 106 A.2d 404 (1954), three months; St. Joseph Hosp., 6 PPER 32, 16 Pa. Cmwlth. 533, 330 A.2d 561 (1974), four months; Allentown Hosp., 3 PPER 14; Greater Nanticoke S.D., 3 PPER 35, five months; Barnes-Kasson Hosp., 4 PPER 48, four months; Com. of Pennsylvania, 5 PPER 44, six months; Lower Bucks Hosp., 6 PPER 142, 12 days.

On the other hand, discharge in close proximity to the time when the employer learns of union activity has been held indicative of anti-union sentiment.*(46)*

Deviations from past practice may show that the employer seeks to intimidate union activists. After 17 years of lateness, but recent interest in a union, an employe is finally disciplined.*(47)* Toleration of drinking and smoking among others, but punishment of a pro-union employe. *Chapin v. PLRB*, 356 Pa. 577, 52 A.2d 568 (1947). Unusually harsh treatment of a union proponent indicates animus. *Penn Twp.*, 6 PPER 187; *Charles Cole Mem. Hosp.*, 3 PPER 286. Failure to follow precedent. *Washington Co.*, 3 PPER 363. Layoff of strikers and retention of non-strikers. *General Braddock A. S.D.*, 6 PPER 99. Absence of proof that the employe had done what he was being punished for. *Clearfield Hosp.*, 5 PPER 31. Inconsistent and contradictory reasons given for layoff. *Philipsburg Boro.*, 7 PPER 299.

On the other hand, personnel changes having equal impact on both union and nonunion employes can hardly be said to be inspired by anti-union animus.*(48)*

Perhaps the most obvious proof of anti-union animus is proof of threats directed at union activity.*(49)* However, not every threat will do, and isolated or spur of the moment threats may not sustain a charge.*(50)*

Other facts rebutting asserted unlawful discrimination are economic justification*(51)*, termination of disabled employes*(52)*, layoffs suggested by a union representative to avoid

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46. **Pisarev v. Am. Meat Cutters & Butchers Workmen, Local 195**, 345 Pa. 123, 27 A.2d 52 (1942); **PLRB v. Sands Restaurant Corp.**, 429 Pa. 479, 240 A.2d 801 (1968); **Chapin v. PLRB**, 356 PPER 577, 52 A.2d 568 (1947); **City of Williamsport**, 2 PPER 163; **Mon Valley Sewage Authority**, 3 PPER 216, fired immediately; **Luzerne Co.**, 3 PPER 204, two days after union meeting; **Reading Model Cities Agency**, 3 PPER 33; **York Hosp.**, 3 PPER 313; **First Judicial Dist.**, 6 PPER 53 and 6 PPER 171; **Philipsburg Boro.**, 7 PPER 299, two weeks after a representation petition was filed.

47. **Forbes Hosp. Syst.**, 6 PPER 60.

48. **Wallingford-Swarthmore S.D.**, 3 PPER 7, changes in bus schedules; **Washington Co.**, 3 PPER 270, layoffs.

49. **PLRB v. Atlas Casket Co.**, 370 Pa. 5, 87 A.2d 645 (1952). **Washington Hosp.**, 3 PPER 363.

50. **Washington Co.**, 3 PPER 270; **Greater Nanticoke S.D.**, 3 PPER 35.

51. **Germantown Dispensary and Hosp.**, 3 PPER 360.

52. **Northumberland Co.**, 3 PPER 302.

strike violence(*53*), discharge of a bus driver urged by an insurance representative(*54*), termination because of failure to secure proper certification(*55*), layoff in conformity with provisions of partially drawn collective bargaining agreement(*56*), obvious employe insubordination(*57*), discharge following complaints by park visitors(*58*), division of work among three persons(*59*), change of work schedule to a rotating program(*60*), presence of communicable tuberculosis(*61*), political considerations.(*62*)

One of the most obvious explanations for termination of an employe is that he is a poor worker. Note, the Supreme Court does not require that the employer explain an employe termination:

> "...an employer retains the right, subject to a single exception, to discharge his employes or any of them for cause or, in the absence of a contractual obligation to the contrary for no cause at all: (citations omitted)...."
>
> "The board (PLRB) was in error in stating that, under the circumstances,"
>
> "'(I)t was necessary for the respondent to explain in a satisfactory manner why Richards was discharged.' On the contrary, as Kaufmann Stores had the right to discharge Richards and gave a lawful, normal, readily comprehensible reason for that action, the burden was upon Richards, the local, or the board to prove the real motive...was an improper one...."(*63*)

Despite the above admonition, when a known union advocate is fired shortly after he begins passing out union authorization cards on an employer's premises, one does well to

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53. SEPTA, 3 PPER 98.
54. Abington Hts. S.D., 2 PPER 51.
55. Lafayette Sch., 2 PPER 110.
56. Scranton Redevel. Auth., 1 PPER 122.
57. York Hosp., 3 PPER 159.
58. Pa. Historical and Museum Com., 3 PPER 196.
59. Cornwall-Lebanon S.D, 3 PPER 49.
60. Conemaugh Valley S.D., 2 PPER 105.
61. Lebanon S.D., 5 PPER 86.
62. City of Philadelphia, 8 PPER 78.
63. PLRB v. Kaufmann Stores, Inc., 345 Pa. 398, 29 A.2d 90 (1942).

present proof that the termination was for a good reason unrelated to union activity. The following cases involve discipline of workers for good cause, that rebutted inference of discrimination for union activity. *St. Joseph Hosp.*, 6 PPER 32, 16 Pa. Cmwlth. 533, 330 A.2d 561 (1974); *Allentown Hosp.*, 3 PPER 14; *Purchase Line S.D.*, 3 PPER 45; *Monongahela Valley Hosp.*, 3 PPER 93; *Interboro S.D.*, 3 PPER 125; *Muhlenberg Twp. S.D.*, 3 PPER 180; *Limerick Twp.*, 3 PPER 207; *Boro. of Wilkinsburg*, 3 PPER 309; *Com. of Pennsylvania*, 4 PPER 54; *Delaware Co.*, 4 PPER 38; *Barnes-Kasson Co. Hosp.*, 4 PPER 48; *First Judicial Dist.*, 6 PPER 53; *Schuylkill Co.*, 6 PPER 15; *Borough of Reynoldsville*, 8 PPER 77.

§8.3 Threats and Coercion of Employes

It is obvious that it is a violation of Section 1201(a) (1) to threaten employes in order to discourage union or other concerted activities. Employes allowed to join unions cannot be ordered to quit their union.*(64)* It was an unfair labor practice to threaten to decrease teaching staff if a grievance were filed.*(65)*

Since Section 401 of PERA guarantees employes the right to refrain from union activity, it was held to be an unfair labor practice to order employes to attend a union meeting and to provide check-off authorizations.*(66)*

The right of employes to engage in concerted or union activity must necessarily be balanced against the interest of the employer to have continued, orderly work and premises. In *Butler County Memorial Hospital*, 5 PPER 81, the nurses protested protracted contract negotiations by wearing black shoe laces. The employer forbade this and suspended nurses for violation of dress code. The board noted that the dress code was a sketchy, generally unenforced regulation and that the wearing of black shoe laces hardly interferred with the employe's performance. The board correctly concluded that the hospital had interferred with the right to union activity.

When unions are organizing, there is often a dispute as to the validity of rules prohibiting solicitation on the employer's

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64. SEPTA, 3 PPER 173.

65. Duquesne City School District, 3 PPER 351.

66. Philadelphia Housing Authority, 3 PPER 197.

premises. NLRB has often ruled that solicitation cannot interfere with work, but that it is entirely proper to talk about unions and unionism on coffee breaks, lunch breaks, and at other times when it will not interfere with work. NLRB has ruled it improper to promulgate a no-solicitation rule in the midst of an organizing campaign. Similarly, it is improper to discipline employes for union orgainizing while tolerating United Fund solicitations, football pools and like efforts.

The PLRB appears to be following the NLRB general course. In *Community General Hospital*, 6 PPER 85, a newly promulgated no-solicitation policy shortly following a union organizational drive and a suspension for solicitation where no other employe had ever been suspended, justified a finding of violation of the act.*(67)* Use of a no-solicitation policy to suspend an employe who did not appear to have violated the policy served as a basis for violation in *Clearfield Hospital*, 5 PPER 31. On the other hand, a no-solicitation clause may be enforced for the good order of the employer's premises.*(68)*

The PLRB has declined to find an unfair practice where an employe was questioned concerning his grading procedures in the normal course of running the school.*(69)* Neither was it an unfair practice for an employer representative to try to dissuade grievants from processing a grievance. The handling of grievances requires a certain amount of reasonable give and take.*(70)*

Meetings with small groups of employes prior to a union election for the purpose of presenting the hospital's arguments to vote against the union, were not coercive. Casual isolated phone calls by employer representatives in which employes are asked to vote against the union, are not coercive.*(71)* An employer is not prevented from making a speech to employes explaining its position concerning the election and being on company time and being more than 24 hours prior to the election.*(72)*

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67. See also **York Hospital**, 2 PPER 184.

68. **Presbyterian University Hospital**, 4 PPER 70.

69. **Conemaugh Valley School District**, 2 PPER 105.

70. **Central Dauphin School District**, 6 PPER 258.

71. **Barnes-Kasson County Hospital**, 4 PPER 48.

72. **Unionville-Chadds Ford School District**, 3 PPER 178.

§8.4 Surveillance and Interrogation of Employes

Surveillance or the questioning of employes for the purpose of learning of the employe's union activities is an unfair labor practice in itself. The reasoning behind this rule is that employes may be reluctant to engage in union or concerted activities if they know or are given the impression that the employer is looking over their shoulders. The NLRB is comparatively strict in its view of the impropriety of spying on or questioning employes.

With regard to interrogation of employes, the PLRB announced that it intended to follow standards set forth in *Bourne v. NLRB*, 56 LRRM 2241, 49 LC ¶18,988, 322 F.2d 47 (1964, CA-2). In *Lower Bucks Hospital*, 6 PPER 142, the PLRB stated:

> "With regard to the alleged interrogation the court in *Bourne v. NLRB*, **supra**, stated...that...interrogation, not itself threatening, is not held to be an unfair labor practice unless it meets certain fairly severe standards. These include:
>
> 1) The background -- i.e. is there a history of employer hostility and discrimination?
>
> 2) The nature of the information sought -- e.g., did the interrogator appear to be seeking information on which to base taking action against individual employes?
>
> 3) The identity of the questioner -- i.e., how high was he in the company hierarchy?
>
> 4) Place and method of interrogation -- e.g., was employe called from work to the boss's office? Was there an atmosphere of 'unnatural formality'?
>
> 5) Truthfulness of the reply."

On the basis of these standards, the PLRB declined to find an unfair labor practice for asking an employe if she had attended a union meeting.

The board may also be quoted as follows:

> "There was evidence of questioning of employes about their union activities and statements made by the commissioners as to the advantages of an unaffiliated group. Mere questioning, in itself, is not an unlawful practice...."(*73*)

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73. **Somerset County Commissioners**, 2 PPER 60, 65.

Improper interrogation was found in *General Braddock Area School District*, 6 PPER 99, 100, where bargaining unit members were asked to rise at a meeting and indicate their union preference. The PLRB also found in violation of Section 1201(a) (1) when an employer demanded that a union grievance chairman report the names of employes whom he would visit at a school building. The union representative was discussing grievances with these employes.(*74*)

The cases involving surveillance of employes are not very satisfactory. In *Somerset County Commissioners*, 2 PPER 60, 65, charges of surveillance leveled against a personnel director were dismissed. He was seen driving in the vicinity of a union meeting, but it developed that he lived in the area and he did not appear to be spying on anyone. In *Western Pennsylvania Hospital*, 3 PPER 221, 223, the union charged that a man walking his dog was spying on them. The facts showed nothing but a dog owner taking his dog for a walk, and that charge was dismissed. On the other hand, and unidentified photographer who came out of the hospital and took pictures was regarded as violating Section 1201(a) (1). The board said:

> "Taking, or pretending to take, photographs of any employe accepting union literature must be deemed to be coercive of the rights of employes to freely organize for their mutual protection and benefit, and there is a violation of Section 1201(a) (1) in the act."

The problem presented by this finding is that the photographer was not identified as being connected with the hospital.

The board did not find it unlawful surveillance for school district personnel to be present in a school building where there was an organizational meeting, since the school district had authorized the meeting, no one requested the school district personnel to absent themselves and the school had advised employes of their rights to organize.(*75*)

In *Pennsylvania Game Commission*, 7 PPER 128, the Game Commission sought to ascertain whether several employes were properly tending to their duties by assigning an

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74. Brownsville Area School District, 3 PPER 321. See also West Allegheny Hosp., 3 PPER 153.

75. Centennial School District, 3 PPER 234.

investigator to watch them. Thereafter, several grievances were filed and PLRB determined that this was unlawful surveillance. PLRB found that "anti-union bias...is not a necessary prerequisite" to find violation of Section 1201 (a) (1). This ruling appears to be wrong. An employer can surely watch his employes to see if they are doing their work, and such surveillance becomes unlawful only when it is connected, or seems to be connected, to union activities.

§8.5 Supervisors and Unfair Practices

PERA creates a substantial and yet unanswered problem for public employers in the amount of control that they may exercise over first level supervisors. The PLRB has adopted the rule of NLRB:

> "An employer is responsible for the acts of its supervisor when he commits an unfair practice (federal citations omitted)"*(76)*

Obviously supervisors, including first level supervisors, exercise a great deal of control over employes reporting to them. They are in a position to make direct or veiled threats and can carry out their threats by bad appraisals of employes or by giving employes less desirable or fewer opportunities to work.*(77)* Although most frequently the supervisor violates employe rights by discouraging membership in a union, it should be noted that employes are guaranteed the right to refrain from union membership by Section 401, and that a supervisor who encourages union membership can also be violating their rights.*(78)*

Contrary to the federal act, first level supervisors are protected by PERA and are granted the right to meet and discuss although they do not have the right to bargain with their employers.*(79)* The right of first level supervisors to meet and discuss and their protection by PERA, have caused the PLRB and one court to hold that supervisors may assist public employes in a rank and file unit in their organizational efforts.*(80)* We thus have the incongruous situation of first

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76. **Duquesne City School District**, 3 PPER 351.

77. **Somerset County Commissioners**, 2 PPER 60.

78. **Philadelphia Housing Authority**, 3 PPER 197.

79. 43 P.S. §1101.704.

80. **Doctors Osteopathic Hospital**, 5 PPER 67, C.P., Erie County; **Bethel Park School District**, 8 PPER 2.

level supervisors being capable of subjecting their employer to liability for their unfair labor practices, but having the right to initiate the organization of rank and file employes.(*81*)

Resolution of this problem must await further litigation, but a logical answer would be to allow first level supervisors to participate in the concerted activities and organization activities of their own meet and discuss units, but to prohibit them from organizational activity in the rank and file units. The difficulties explained here are relevant to the "conflict of interest" problems discussed in *PLRB v. Eastern Lancaster Co. School District*, 4 PPER 1, 11 Pa. Cmwlth. 482, 315 A.2d 382 (1974) and *Elwood City School District v. Secretary of Education*, et al., 3 PPER 247, 9 Pa. Cmwlth. 474, 308 A.2d 165 (1973).

§8.6 Domination of Employe Organizations

An employer is prohibited from dominating or interfering with the formation, existence or administration of any employe organization.(*82*) The section is based on Section 8(a) (2) of NLMRA, 29 USCA §158 (a) (2). Both of these sections are aimed at such things as "company unions", or other organizations which are controlled by or favored by the employer and whose loyalty to employes is put in question. Obviously, it does not effectuate the purposes of the act to have a labor organization willing to bow to the will of employer. Similarly, it is improper for the employer to take action which will result in the election of a favored labor organization and rejection of a labor organization unacceptable to management.

In very few cases has there been found a violation of this section. Many of the cases appear to have arisen from the fact that charging party alleged violations of several sections and included 1201(a) (2) as a catchall.

The PLRB notes that some complaints against employers include charges of union domination in "shotgun-type approach".(*83*) This shotgun approach and lack of understanding as to what is really contemplated by Section 1201(a) (2) resulted in the following cases where no violation of that section was found. It was held that it was not a violation of the section

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81. **Bethel Park S.D.**, 8 PPER 2.

82. 43 P.S. §1101.1201.

83. **Duquesne City School District**, 3 PPER 351, 353.

to help three employes withdraw authorization given a union. *City of Williamsport*, 1 PPER 115. Although the conduct might have added up to other unfair labor practices it was not a violation of Section 1201(a) (2) to threaten to fire an employe, (*Duquesne City School District*, 3 PPER 351) or to engage in general anti-union conduct (*Somerset County*, 2 PPER 60, 65), nor did it violate that section to send letters to employes advising them of the course of bargaining (*Portage Area School District*, 4 PPER 23) or to include guards in a "rank and file" bargaining unit (*Pennsylvania Historical and Museum Commission*, 3 PPER 196) or to terminate an employer (*Upper St. Clair School District*, 5 PPER 96) or to terminate check-off on promotion of employes outside of their bargaining unit or post a notice of a new position and note that there could be no conflict of interest in that position (*Elizabethtown Area School Board*, 5 PPER 31) or to grant wage increases, conduct captive audience speeches or distribute information bulletins to employes in a union campaign (*Unionville-Chadds Ford Area School District*, 3 PPER 178).

On the other hand, the following matters did appear to be matters properly considered under the heading of Section 1201(a) (2), domination of collective bargaining agents. In *Forest Hills School District*, 2 PPER 202, the PLRB properly found that dissemination of literature to union members was not illegal domination and contained the following quotation from *American Ice Company Employees Association, Inc. v. American Ice Company*, 5 LC ¶61,030:

> "...The true issue in a charge of this nature is whether the employer dominated and controlled the association to such an extent that it did not offer the employes freedom of representation and collective bargaining guaranteed by the act."(*84*)

A typical violation of this section was found in *Allentown School District*, 1 PPER 8, where the superintendent of schools supported one labor union over another and where payments were made that resulted in the support of the Future Teachers of America, an affiliate of a favored labor organization. These activities were found to be an unfair labor practice although the case was somewhat modified.(*85*) Other activity that was arguably in violation of the section consisted of allowing the

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84. Court of Common Pleas of Philadelphia County, 1942.

85. 1 PPER 59.

incumbent labor organization to use mail boxes situated in the school building for distribution of union announcements. In two cases, the PLRB found no unfair advantage given to the incumbent over outside labor organizations.(*86*)

§8.7 Discrimination for Use of PLRB Process

Section 1201(a) (4) states that it is an unfair labor practice to discharge or otherwise discriminate against an employe because he has signed or filed an affidavit, petition or complaint or given any information or testimony under PERA. Although this section is not often violated, it is a very important section to the operation of the PLRB and to the proper enforcement of PERA. Proof of violation of this section would closely follow the concepts applied in a case where discrimination for union activity was charged. An example of this is *William Penn School District*, 2 PPER 170. In that case, an employe testified against the school district and thereafter retired at age 65 and began teaching as a substitute. The school district passed a rule prohibiting use of teachers older than 65 as substitutes. The rule affected only two out of 150 teachers and followed close on the testimony given by the teacher. Statements had been made by the school board to the superintendent that he was to refrain from hiring the affected teacher despite his high opinion of her. The board inferred illegal discrimination. In *York Hospital*, 3 PPER 159, an employe who had testified in a board hearing was found not to have been discriminated against for lack of anti-union animus because the hospital appeared to be justified in his suspension. One odd aspect of this case is that the board declined to look at union involvement and testimony more than four months prior to filing of the charge. The net effect of the PLRB discussion seemed to be that if an employer were willing to wait more than four months after union activity to discriminate against an employe, he could not be found guilty of an unfair labor practice. This seems incorrect and one should not be misled by dicta in this case.(*87*) Two other cases dealing with discrimination for giving testimony are: *City of McKeesport*, 3 PPER 161 and *Plymouth Township Board of Commissioners*, 3 PPER 315.

An interesting point is raised in *Midland S.D.*, 7 PPER 317, where an employer was found guilty of discrimination

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86. **Interboro School District**, 3 PPER 125 and **Bensalem Township School District**, 2 PPER 12.

87. See Section 10.3.

against an employe who used the grievance procedure. It is suggested that Section 1201(a) (4), 43 P.S. §1101.1201(a) (4) is intended to protect employes who utilize the unfair practice procedure of PERA and not those who file grievances. Contrary to the decision in the *Midland School District* case, it would seem to be a violation of the refusal to bargain sections of PERA, 43 P.S. §1101.1201(a) (5) to intimidate employes who would file a grievance and it would certainly be interference with rights guaranteed by Section 1201(a) (1), 43 P.S. §1101.1201(a) (1).

Complaints voiced to governmental officials, even though related to labor problems, are not protected by PERA, unless it in some way relates to the matters specified in PERA and relates to PERA procedures themselves.(*88*)

§8.8 Union Unfair Practices

§8.8.1 Interference, Coercion, and Restraint

As heretofore noted, employes are granted the right to engage in union activity or to refrain from engaging in such activity.(*89*) The cases under federal law, have granted labor unions certain rights to discipline its members in participating in such things as strikes, picketing and so forth. However, unions cannot coerce nonmembers, and cannot coerce members to do unlawful acts. An employe who resigned from her union after the contract had expired cannot be fined or threatened with a fine for going back to work during a strike.(*90*) Neither could an officer of a minority union that had called a ''sick out'' threaten employes who had declined to honor the sick out and had gone to work.(*91*)

Contract provisions compelling union membership such as agency shops or union shops or maintenance of membership provisions restrict an employe's right to refrain from engaging in union activity. Nevertheless, maintenance of membership is authorized by PERA, 43 P.S. §1101.301(18) and §1101.705. The PLRB has approved union efforts to terminate employes who do not pay their dues.(*92*) However, the Commonwealth Court has

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88. **Beaver County**, 7 PPER 307.

89. 43 P.S. §1101.401.

90. **PSSU**, 7 PPER 266, 7 PPER 103.

91. **Baldwin-Whitehall School District**, 3 PPER 40. **See also City of Lebanon**, 7 PPER 241.

92. **Allegheny County**, 6 PPER 287; **Butler Education Association**, 6 PPER 107.

found that maintenance of membership clauses provide for a means of termination which is contrary to the Public School Code and that an employe cannot be terminated for failure to comply with the maintenance of membership provision.(93)

A less obvious means of coercion of employes is for the union to render disparate treatment on the basis of their membership or participation in a labor organization. If a labor union could favor bargaining unit members whom it liked and discriminate against whom it did not like it could compel people to do very much what it pleased. These concepts were discussed in *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed.2d 842 (1967). Disparate treatment is often claimed when a union does not take a grievance to arbitration. However, unions are not compelled to take every grievance to arbitration and are allowed to use discretion in deciding what will be arbitrated and what will not be arbitrated.(94)

There is a handful of cases where the board has declined to find the union in violation of 1201(b) (1). In *Philadelphia School District*, 3 PPER 64, it was not an unfair labor practice for an association representing nurses to allow it members working in parochial schools to go to work at a time when the city schools were on strike. In *AFSCME*, 3 PPER 330, the board held that there was no violation of the act when a member claimed he had been put in an inconvenient unit. It was not an unfair labor practice for an independent union considering affiliation with a national union to refuse to allow nonmembers to vote on the affiliation.(95) Nor was it an unfair labor practice for a union to conduct a mock clothing drive for nonmembers of the union whom it implied were so poor that they could not afford to pay union dues to a union who was bringing them higher wages and improved benefits.(96)

§8.8.2 Maintenance of Membership

PERA provides that employes have a right to refrain from union activity which necessarily includes the right to decline

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93. **Dauphin County Technical School Education Association v. Dauphin County Area Vocational Technical School Board**, 7 PPER 217 Cmwlth 639, 357 A.2d 721 (1976); **Butler County Education Association**, 7 PPER 233, Court of Common Pleas of Butler County.

94. **Philadelphia Community College**, 5 PPER 105; **Teamsters Local 161**, 6 PPER 257; **SEPTA**, 7 PPER 38.

95. **School District of Pittsburgh**, 5 PPER 68.

96. **AFSCME**, 5 PPER 73.

union membership.(97) Obviously, a requirement in a collective bargaining agreement that employes join a union or otherwise participate in the union would infringe upon their rights. However, in order that a union may function, it must have dues and it must have a means of holding its membership even though members may become discontented with the union. Various forms of ''union security'' have been devised by labor unions. Only one of them, maintenance of membership, is lawful under PERA. Other forms of union security consist of the ''closed shop'' where individuals must belong to the union representing employes at a work place **before** those employes can even go to work. This form of union security is outlawed under PERA and also under NLMRA. In the federal sector, NLMRA provides for the ''union shop''. In a union shop, employes are obliged to join the union at their work place within 30 days (seven days in some cases) after they are employed. Another form of union security is the ''agency shop''.

The agency shop is similar to a union shop except that employes are obliged to meet the financial obligations of the union, payment of initiation fees and dues, but they are not actually required to become members of the labor union.

PERA provides for what is known as a ''maintenance of membership''. This is specifically spelled out in PERA as follows:

> ''Membership dues deductions and maintenance of membership are proper subjects of bargaining with the proviso that as to the latter, the payment of dues and assessments while members, may be the only requisite employment condition.''(98)

Maintenance of membership is further defined by PERA:

> ''(18) 'Maintenance of membership' means that all employes who have joined an employe organization or who join the employe organization in the future must remain members for the duration of the collective bargaining agreement so providing with a proviso that any such employe or employes may resign from such employe organization during the period of 15 days prior to the expiration of such agreement.''(99)

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97. 43 P.S. §1101.401.

98. 43 P.S. §1101.705.

99. 43 P.S. §1101.301 (18).

All of the union security devices discussed are based on contract. If the employer does not consent to the maintenance of membership provision, there is no such requirement. A contractual provision establishing an agency shop is unlawful and may not be enforced.(*100*)

In several cases, employes have been discharged for failure to pay union dues while they were obliged to maintain their membership in the union. PLRB has declined to find any impropriety in this if there is a maintenance membership clause in the relevant contract.(*101*) However, there is recognition of the fact that employes may resign from the union either within 15 days prior to the expiration of the contract, as provided by the statute, or after the contract actually does expire, provided no new contract has been executed.(*102*) Employes who transfer out of a collective bargaining unit are no longer subject to a maintenance of membership provision and the employer no longer has an obligation to check-off dues. Necessarily, the employer could not terminate these employes for failure to pay their dues.(*103*)

Several recent cases have dealt with the conflict between PERA and the Public School Code. The Public School Code provides certain causes for termination which do not include failure to pay dues.(*104*) Employes sought to be terminated for failure to pay dues have raised the objection that maintenance of membership provisions conflict with the School Code and that where the contract goes contrary to statute, the statute must prevail.(*105*) The PLRB did not accept this argument.(*106*) Nevertheless, in two different cases the Commonwealth Court did agree with it and announced that it was unlawful to terminate school teachers for refusal to comply with maintenance of membership provisions.(*107*) There

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100. **PLRB v. Zelem, et al.**, 5 PPER 108, 459 Pa. 399, 329 A.2d 477 (1974).

101. **Philadelphia Housing Authority**, 3 PPER 197; **Allegheny Co.**, 6 PPER 287.

102. **Philadelphia Federation of Teachers, Local No. 3 v. Board of Education of School District of Philadelphia**, 458 Pa. 342, 327 A.2d 47 (1974); **Butler County Education Association**, 6 PPER 107.

103. **Elizabeth Area Board of School Directors**, 5 PPER 31.

104. 24 P.S. §11-1122.

105. 43 P.S. §1101.703.

106. **Freeport Area School District**, 3 PPER 181.

107. **Dauphin County Technical School Education Association v. Dauphin County Area Vocational Technical School Board**, 7 PPER 217, 24 Pa. Cmwlth. 639, 357 A.2d 721 (1976); **PLRB v. Uniontown Area School District**, ____ Pa. Cmwlth. ____, 367 A.2d 738 (1977); *See also* **PLRB v. Butler Ed. Assn.**, 7 PPER 233.

seems little doubt but that the issue presented by these cases will find its way to the Pennsylvania Supreme Court.

§8.8.3 Boycotts

PERA prohibits a labor organization from:

> (7) Engaging in, or inducing or encouraging any individual employed by any person to engage in a strike or refusal to handle goods or perform services; or threatening, coercing or restraining any person where an object thereof is to (i) force or require any public employer to cease dealing or doing business with any other person or (ii) force or require a public employer to recognize for representation purposes an employe organization not certified by the board.

Several cases have been decided under this section. In *Beaver County Education Association,* 1 PPER 68, it was held unlawful for the employe association to encourage its members to withdraw from a student teacher training program. The board concluded that the withdrawal of the teachers from the program would compel the school district to stop doing business with the state colleges and universities involved in the program. In *Baldwin-Whitehall School District*, 3 PPER 40, a minority union encouraged a ''sick out'' in an effort to compel the public employer to meet with it and discuss the suspension of one of its members. No violation was found in *Connellsville Area Education Association*, 4 PPER 126, where it was concluded that the union representative had left it up to employes whether they cared to leave the premises early and where there was majority and not a minority union making demands on the employer.

§8.9 Deferral to Arbitration

The PLRB has referred to *Collyer Insulated Wire*, 192 NLRB 837 (1971) in a number of its decisions. In that case, the NLRB indicated a willingness to defer formal NLRB action until the grievance-arbitration procedures had been given an opportunity to resolve the dispute. This is consistent with the policy of both the NLMRA and PERA. The general standards applied for deciding when the NLRB would refer to arbitration are as follows:

1) The controversy arose ''within the confines of a long and productive collective bargaining relationship'' and there was no

claim of "emnity by respondent to employe's exercise of protected rights".

2) "Respondent has...credibly asserted its willingness to resort to arbitration under a clause providing for arbitration in a very broad range of disputes and unquestionably broad enough to embrace 'the dispute before the board'."

3) "The contract and its meaning lie at the center of the dispute."

A whole body of law has grown up in the NLRB relating to just when the NLRB will or will not defer to arbitration.

The PLRB made a reference to the *Collyer* decision in *Upper Merion Area S.D.*, 2 PPER 143. That case was based upon a controversy involving the contract and PLRB declined to defer to arbitration and did find a refusal to bargain. However, it directed the parties to go to arbitration in order to resolve their contractual dispute.

If anything, the PLRB's deferral to arbitration is less predictable than deferral under the national act. Generally, there is no deferral even though the contract may be an issue in deciding if there is an unfair labor practice.(*108*) Deferral would certainly be inappropriate where it appeared that there was an effort to "break the union".(*109*) On the other hand, in one case it was argued that late response to a grievance constituted an unfair labor practice. Quite properly, the PLRB dismissed this charge.(*110*)

In some of the cases, the *Collyer* doctrine has been confused with efforts by parties to a collective bargaining agreement to secure enforcement of that agreement through the PLRB. The PLRB is not charged with the responsibility of enforcing contracts. It may enforce contracts when an unfair labor practice is intertwined with a contract violation, but the board is remedying the unfair practice and is not enforcing the contract.(*111*) In *Bucks County Area Vocational Technical*

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108. **Penn Township**, 6 PPER 187; **Crestwood Board of School Directors**, 4 PPER 37; **SEPTA**, 2 PPER 29.

109. **General Braddock Area School District**, 6 PPER 99.

110. **Commonwealth of Pennsylvania**, 3 PPER 92.

111. **Scranton School District**, 6 PPER 298; **Smith Township Municipal Authority**, 6 PPER 144; **West View Municipal Authority**, 6 PPER 45; **Allentown School District**, 5 PPER 88; **Commonwealth of Pennsylvania**, 5 PPER 76; **Allegheny County Port Authority**, 8 PPER 57.

School, 6 PPER 230, the PLRB does seem to deviate from its general course of not interpreting contracts. However, this case involved a question of who was and was not included in a collective bargaining unit and this undoubtedly bore on the board's thinking.

§8.10 Conflict of Interest Provisions

PERA contains the following provision with regard to conflict of interest:

> "§1101.1801 Conflict of Interest.
>
> (a) No person who is a member of the same local, state, national or international organization as the employe organization with which the public employer is bargaining or who has an interest in the outcome of such bargaining which interest is in conflict with the interest of the public employer, shall participate on behalf of the public employer in the collective bargaining process with the proviso that such person may, where entitled, vote on the ratification of an agreement.
>
> (b) Any person who violates subsection (a) this section shall be immediately removed by the public employer from his role, if any, in the collective bargaining negotiations or in any matter in connection with such negotiations."

Early in the existence of PERA this section was called upon to be interpreted by the PLRB. Several school districts had notified department chairmen, first level supervisors, that they must either resign from the collective bargaining unit representing rank and file employes or they must resign from their position as department chairmen. The public employers based this demand on the above cited section and said that the first level supervisors were engaged in collective bargaining in that they handled grievances at the first step of the grievance procedure. The PLRB took the position that the grievance procedure was not a part of collective bargaining and that since first level supervisors were given the right to organize, they should not be compelled to give up their supervisory positions but rather should be removed from the grievance procedure.(*112*) The *Eastern Lancaster County School District* case, supra, was appealed to the Lancaster County Court and that

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112. Eastern Lancaster Co. School District, 2 PPER 152; Big Spring School District, 2 PPER 172; Salisbury Township Board of Education, 3 PPER 276.

court found a conflict of interest based upon the first level supervisor's participation in the grievance procedure, which it concluded was a part of the collective bargaining process. It cited 43 P.S. §1101.1201(a) (5) of PERA and *Pittsburgh City Fire Fighters Local No. 1 v. Barr*, 408 Pa. 325, 184 A.2d 588 (1962) for this proposition. Section 1201(a) (5) does state that collective bargaining includes "the discussing of grievances with the exclusive representative" of employes.

However, two Commonwealth Court cases reject the conclusion of the Lancaster County Court and affirm the PLRB's decision. The Commonwealth Court recognizes the merit in the argument that grievance handling may well be part of collective bargaining but says that Section 1801 of PERA directs the employer to remove from his collective bargaining role the union member with the conflict of interest.(*113*) The argument is not likely to end here. It should be noted that all of these cases arose under the conflict of interest section cited above. No attention was given to the definition of confidential employe spelled out in Section 301(13).(*114*) If handling of grievances is itself part of the collective bargaining procedure which is discussed under the portion of this book dealing with confidential employes, department chairmen could very well be excluded from the definition of employe by virtue of the fact that they are confidential employes. If this is the case, it would be entirely proper for the school district to direct them to sever their relationship with an employe organization or have their "confidential-supervisory" role terminated. This point has not been argued and must wait another day.

Conflict of interest is not a problem affecting employers alone. In several cases, key administrators have been members of employe organizations and those organizations have demanded that the administrators be removed from the employer bargaining team under the conflict of interest section. Undoubtedly, the unions were concerned about having management employes attending union meetings and then going back to management sessions and telling management about union strategy. In both of these cases, the PLRB found the public employer guilty of an unlawful refusal to bargain

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113. PLRB v. Eastern Lancaster County School District, 4 PPER 1, 11 Pa. Cmwlth. 482, 315 A.2d 382 (1974); Ellwood City Area School District v. Secretary of Education, 3 PPER 247, 9 Pa. Cmwlth. 477, 308 A.2d 635 (1973).

114. 43 P.S. §1101.301 (13).

under Section 1201(a) (5). The refusal to bargain was derived from Section 1801 of PERA and was based on the employer's failure to remove the administrators from the bargaining team.(*115*)

In another case, the PLRB found that it was not a refusal to bargain to refuse to meet and discuss where supervisory personnel represented nonsupervisory personnel or where nonsupervisory personnel represented supervisory personnel. The board stated:

> "We believe that supervisory and nonsupervisory employes have complete and separate interests in their dealings with the employer. Due to the different interests, there is a real possibility that a conflict could arise in the manner in which certain matters could and would be pursued by representatives in cross-unit situations. There is an inherent conflict of interest where an employe, who is a first level supervisor under Section 301(6) of the act, bargains on behalf of employes who are rank and file employes and which he supervises, with the same employer. We cannot permit this possibility to exist. We must protect the integrity of each group and assume that the interests of each shall be pursued to the fullest extent. This is true for both collective bargaining and in pursuing grievances."(*116*)

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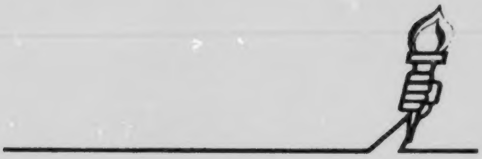
115. **Moon Area School Board**, 4 PPER 10; **South Allegheny School District**, 6 PPER 299.

116. **Commonwealth of Pennsylvania**, 6 PPER 89.



§9. Strikes

§9.1 Introduction

PERA changed prior law in Pennsylvania and gave public employes the right to strike. It did not give all public employes the right to strike, nor did it give them a right to strike like that enjoyed by employes in the private sector.

Strikes are prohibited during the prescribed procedures of bargaining, mediation and fact finding.(*1*) Only when these procedures are exhausted can public employes strike. Even then, the strike may be terminated by the court if the strike "creates a clear and present danger or threat to the health, safety or welfare of the public..."(*2*)

PERA expressly prohibits paying wages to strikers.(*3*) It also contains a provision making public employes "adjudged guilty of...contempt...subject to suspension, demotion or discharge at the discretion of the public employer...."(*4*) This provision seems aimed at allowing another ground for discipline of public employes beyond those means provided by other statutes.

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1. 43 P.S. §1101.1002.
2. 43 P.S. §1101.1003.
3. 43 P.S. §1101.1006; **see also North Cambria S.D., 3 PPER 318.**
4. 43 P.S. §1101.1005.

As to guards at prisons or mental hospitals, and as to court-related employes, PERA states:

> "Strikes by guards at prisons or mental hospitals or employes directly involved with and necessary to functioning of the courts of this commonwealth are prohibited from striking at any time."*(5)*

Such employes may utilize final and binding arbitration.*(6)*

PERA does allow a right to strike but it is obvious that it is a restricted one. Following is a discussion of the main problems involved in strikes under PERA.

§9.2 Violation of Mediation and Fact Finding Procedures

Section 1002, 43 P.S. §1101.1002, provides:

> Section 1002. Strikes by public employes during the pendency of collective bargaining procedures set forth in sections 801 and 802 of Article VIII are prohibited. In the event of a strike during this period the public employer shall forthwith initiate an action for the same relief and utilizing the same procedures required for prohibited strikes under Section 1001.

Sections 801 and 802, 43 P.S. §1101.801 and §1101.802, provide for a system of bargaining, mediation by the Pennsylvania Bureau of Mediation and possibly fact findings. Below is an outline of their provisions.

Section 801 - Time for Requesting Mediation

Bargaining starts after at least 21 days	>	parties may	>	request mediation
but not later than 150 days prior to budget submission date	>	parties shall		

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5. 43 P.S. §1101.1001.

6. 43 P.S. §1101.805 and §1101.806.

Section 802 - Time for Fact Finding and Strike

Mediation commenced 21 days after	>	mediation may	>	notify PLRB of failure of mediation	>	PLRB may appoint fact finder; if no appointment, union may strike.
but in no event later than 130 days prior to budget submission date	>	mediation shall				

Section 801 (1) (2) (3) - Time for Publication of Fact Finding and Strike

- Mediation notified.
- Not more than 40 days after PLRB was notified, findings of fact shall be sent to both parties.
- Not more than 10 days after findings and recommendations are sent, the parties shall notify PLRB of acceptance or the panel shall publicize the findings of fact and recommendations.
- Not less than five days nor more than 10 days after publication, parties shall again notify each other of acceptance or nonacceptance.
- If no acceptance, union may strike.

The system contemplates bargaining for a reasonable time, mediation for a reasonable time and then resort to fact finding by a person or persons appointed by the PLRB. Fact finding is not binding, but the effect of publication of the findings and recommendations is to put pressure on both parties to settle along the lines of fact finding. A strike may occur only after fact finding is decided against by the PLRB or after fact finding is completed. Note also that the time system is directed at completing all of the procedures before the budget submission date. The thrust of the provisions is settlement before the budget need be submitted.

What is the effect of failure to comply with the specified time limits? The answer, "not much", seems appropriate. Nobody seems to pay much attention to time constraints. In *Un. Transportation Union v. SEPTA*, 7 PPER 106, ____Pa. Cmwlth.____, 347 A.2d 509 (1976) bargaining started 150 days before budget submission date; however, the request to supply a mediator was late, mediation began late, the PLRB was not notified by the Bureau of Mediation until after the budget submission date and the PLRB did not appoint fact finders until after the contract expired and the workers struck. The lower court's issuance of an injunction was affirmed by the

Commonwealth Court that commented on failure to comply with the time limitations but noted that the purpose of sections 801 and 802 was two fold: 1) to assure that "the public employer's proposed budget of expenditures can be adequately prepared in time for submission to the appropriate governing body for final action on the date for which such submission is required by law in practice"; 2) to assure "that the designated substantive **procedures** of collective bargaining are to be utilized to exhaustion prior to the lawful initiation of any strike by public employes".

In the *United Transportation Union* case, **supra,** the Bureau of Mediation had not recommended appointment of fact finders and none were appointed until after the strike. The court noted that Section 1002 "speaks of the exhaustion of procedures and not of the adherence to schedules". The failure to **exhaust mediation** was the critical item in this case. The failure to completely utilize the procedures justified issuance of an injunction.(7) The case is consistent with *Bellefonte Ed. Assn. v. Bd. of Ed. of Bellefonte Area S.D.*, 3 PPER 145, 9 Pa. Cmwlth. 210, 304 A.2d 922 (1973), where the Bureau of Mediation notified the PLRB that no agreement had been reached and the PLRB declined to appoint a fact-finding panel. The court said: 1) it was discretionary for the PLRB to appoint or not to appoint a panel; 2) the parties were not obliged to urge the PLRB to appoint a panel; and 3) that continuation of mediation after the PLRB had declined to appoint a fact finder, did not make the strike illegal.

§9.3 "...clear and present danger..."

Section 1003 of PERA states when public employes may lawfully strike:

> "Section 1003. If a strike by public employes occurs after the collective bargaining processes set forth in sections 801 and 802 of Article VIII of this act have been completely utilized and exhausted, it shall not be prohibited **unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public....**"(*8*)

Wildcat strikes, or any strikes engaged in without resort to the procedures of sections 801 and 802 of PERA are

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7. See also S. Allegheny S.D., v. S. Allegheny Ed. Assn., 55 D&C2d 94; Co. of Mercer v. Un. Steel Workers, 60 D&C2d 631.

8. 43 P.S. §1101.1003, emphasis added.

unlawful.(9) The same section that allows strikes by public employes states that such strikes are allowed only "until such strike creates a clear and present danger or threat to the health, safety or welfare of the public".

The effects of a strike that create "a clear and present danger..." are most completely spelled out in *Bristol Twp. Ed. Assn. v. School Directors of Bristol Twp.*, 14 Pa. Cmwlth. 413 322 A.2d 767 (1974). Seventeen items were mentioned in that case. The court said:

> "...we cannot hold that any of them taken alone or considered together would necessarily constitute a basis for the injunction issued herein."

However, after a 26-day strike, the Commonwealth Court held:

> "...it would not necessarily have been unreasonable for the chancellor to find that some of the above-noted inconveniences had accumulated or been aggravated to such an extent as to warrant the issuance of an injunction... . Under the circumstances here, therefore, the court below had sufficient grounds for issuing an injunction."(*10*)

Following is a listing of the 17 items mentioned in the *Bristol Twp.* case, supra. Also listed are other cases that have referred to the listed hardship upon the public:

> "1) Many of the students, who comprise approximately 20% of the township population, are being denied complete education programs..."(*11*)
>
> "2) Working mothers, who may have school-age children, are injuriously affected by the strike..."
>
> 3) Strike days had so eroded the school year as to soon make impossible make up of instructional student days by close of the fiscal year on June 30, 1974. In regard to this, the Commonwealth Court said in *Bristol*, supra.
>
> > "...To suggest that such a substantial loss of number of instructional days can be made up later in the year — a

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9. Somerset Co., 2 PPER 60.

10. Bristol Twp. case, 14 Pa. Cmwlth. 413, 420, 322 A.2d 767 (1974).

11. See also Phila. Fed. of Teachers, 8 Pa. Cmwlth. 204, 301 A.2d 405, 410; Montour S.D., 7 PPER 322.

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> position which is far from clear in this case — is but to recognize the importance of a minimum number of instructional days to meet minimum educational standards and to equally recognize that a lesser number is a very real threat to the health and welfare of at least the school population segment of the public."

"4) (a) Partial loss of state reimbursement — a substantial sum... is suffered by a district for failure to comply with state requirements." The Commonwealth Court said:

> "As to the potential loss of state subsidies because of the failure of the schools to operate for the required time, this is, of course, an important factor to be considered in the overall assessment of the effects of such a strike. In *Root v. Northern Cambria School District*, 10 Pa. Common. Ct. 174, 181, 309 A.2d 175, 178 (1974), we said, '(t)he loss of any money needed to support the schools, especially those closed by labor troubles, is clearly a threat to the general welfare and, as *Armstrong* (5 Commonwealth Ct. 378, 291 A.2d 120) suggests, could compel injunctive relief.' This does not mean, of course, that the Legislature intended to put a limit on the number of days that a strike might last. Nor does it mean that the mere loss or threatened loss of subsidies is alone sufficient to warrant the enjoining of the strike. It is also necessary to establish that the loss of such subsidies would present a danger or threat to the health, safety or welfare of the public. Here the chancellor specifically found, on the basis of sufficient evidence, that the appellee would be unable to make up all the days lost by the strike and that a continuation of the strike would further aggravate the situation. The subsidy could be lost for the days not make up and there was evidence offered as to the effect of such a possibility. **The chancellor weighed this evidence, as was his responsibility, and determined that the threatened loss of the subsidies would constitute a danger which required that the strike be enjoined. We cannot hold that he erred in so finding."** Emphasis added.*(12)*

"5) Cafeteria workers and bus drivers have lost wages..." *(13)*

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12. See also Phila. Fed. of Teachers v. Ross, 8 Pa. Cmwlth. 204, 301 A.2d 405, 410 (1973); Montour S.D., 7 PPER 322.

13. See also Montour S.D., 7 PPER 322.

"6) Special education and training programs for most of mentally retarded, brain injured and socially and emotionally disturbed students are not being conducted..."(*14*)

"7) There is a likelihood that the nonattendance of college-bound high school seniors will work to their disadvantage in college admission..." The Commonwealth Court commented in *Bristol:*

> "...Nor should we overlook the high school seniors intending to further their education, who are indeed threatened in a real sense with respect to qualifying for college entrance."(*15*)

"8) County services are unavailable for students with hearing, vision or speech disabilities..."

"9) Extra-curricular activities are not in operation..."

"10) Driver education..."

"11) A community swim program which involves lifesaving courses and rescue squad practice;..."

"12) Adult education for basic subjects and citizenship training, high school instruction and enrichment education;..."

"13) A cooperative work experience program..."

"14) The only driver improvement program in the lower Bucks County (for retention of operating privileges upon accumulation of points);..."

"15) Federally funded 'itinerant teachers' programs;..."

"16) Social worker programs; and

"17) Free lunch... ."

As to the last three programs, the Commonwealth Court said:

> "Even as to the communitywide programs, those not involved only with the schools or the educational pro-

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14. See also Montour S.D., 7 PPER 322.

15. See also Montour S.D., 7 PPER 322.

> cess, the cumulative and extended loss of such programs (i.e., programs for social workers and ‘itinerant teachers, the work experience program, the driver improvement program, etc.) could have a detrimental effect on the welfare of the community as a whole. See *Ross*, supra. Under the circumstances here, therefore, the court below had sufficient grounds for issuing an injuction.”(*16*)

In another case, the Commonwealth Court added one more specific item to the list in increased “gang activity”, emphasizing financial burden in the activity.(*17*)

The right to strike was never intended to give public employes the ability to bring the community to its knees. The stated policy of the Public Employe Relations Act is as follows:

> “The General Assembly of the commonwealth of Pennsylvania declares that it is the public policy of this commonwealth and the purpose of this act to promote orderly and constructive relationships between all public employers and their employes **subject, however to the paramount right of the citizens of this commonwealth to keep inviolate the guarantees for their health, safety and welfare.**” (*18*)

§9.4 The 180-Day Requirement

One of the most critical factors the courts have considered in issuing injunctions in cases of prolonged strikes is the requirement for school districts to provide 180 days of instruction.

Section 1501 of the Public School Code of 1949 provides:

> “All public kindergartens, elementary and secondary schools shall be kept open each school year for at least one hundred-eighty(180) days of instruction for pupils....”(*19*)

In labor disputes affecting teachers, the provision becomes significant when a school district takes action mandated by Section 1003 of the Public Employe Relations Act, 43 P.S. §1101.1003, to prohibit a strike that “...creates a clear and

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16. 14 Pa. Cmwlth. 413, 420; see also Montour S.D., 7 PPER 322.

17. Phila. Fed. of Teachers, 8 Pa. Cmwlth. 204, 301 A.2d 405, 410 (1974).

18. 43 P.S. §1101.101. Emphasis added.

19. 24 P.S. §15-1501.

present danger or threat to the health, safety or welfare of the public...." The 180-day instructional requirement is a legal standard below which the school district should not fall in its duty to its pupils. It is also a legal requirement that may have to be met to qualify for governmental subsidies. Inadequate instruction and threatened loss of subsidies are reasons for compelling teachers back to school.

Root v. Northern Cambria School District, 10 Pa. Cmwlth. 174, 179, 180, 309 A.2d 175 (1973) dealt with the issue of a strike-shortened year and said:

> "...The Legislature's direction that schools shall be kept open 180 days of course means that school boards shall schedule and attempt to provide for school sessions of this duration. Boards are not, however, thereby required to do either the impossible or the impractical in circumstances not within their control. There are many reasons why, having scheduled the required number of instructional days, the board may be unable to provide them, one of the most obvious of which is the strike action by its employes sanctioned by the Public Employe Relations Act, Act of July 23, 1970, P.L. 563, 43 P.S. §1101.101 et seq.
>
> "...Boards must schedule 180 days and provide this number or, if **unavoidable cause prevents, amend the schedule so as to provide as many days as sound educational practice would indicate. In this determination, its professional administrators' opinions should have the greatest weight.**" Emphasis added.

A recent appellate case in this area is *Commonwealth v. Union Area School Board*, 24 Pa. Cmwlth. 442, 356 A.2d 866 (1976) in which the school board declined to modify the school calendar to make up lost days. The court said:

> "...The board has a positive duty to provide 180 days of instruction for the pupil attending the Union Area School District schools in accord with the provisions of Section 1501 of the Public School Code...."

To the extent this rule was in conflict with the earlier *Root* decision, *Root* was said to be overruled. The *Union Area School Board* case was commented upon in the more recent opinion of the Commonwealth Court, *Commonwealth v. Mifflin County School Board*, ____ Pa. Cmwlth. ____, ____ A.2d ____ (1977). In that case the acting secretary of education sought to compel the school board to provide the full 180 days of instruction specified in the statute. It was argued by the commonwealth that this was absolutely compulsory under the *Union Area School Board* case, and that to the extent that *Root* provided to the contrary, *Root* had been overruled. The court rejected this argument and noted that the decision in *Union Area School Board* was that of three judges, concurred in by three other judges, with Judge Kramer not participating the ruling. Although three of the judges said that *Root* was overruled, no such statement was made by the other three judges. The court concluded that *Root* and a similar holding in *Commonwealth v. Leechburg A.S.D.*, 19 Pa. Cmwlth. 140, 339 A.2d 149 (1975), were not overruled and that the commonwealth's motion of peremptory judgment was improper. Before the commonwealth's demand that the school board make up sufficient days to total the stated 180. the school board must have been given opportunity to prove its allegations relating to the adverse educational impact of rescheduling the strike lost days.

Even if 180 days of instruction were not absolutely required, the Commonwealth Court has stated as follows:

> "...To suggest that such a substantial loss of number of instructional days can be made up later in the year--a position which is far from clear in this case--is but to recognize the importance of a minimum number of instructional days to meet minimum educational standards and to equally recognize that a lesser number is a very real threat to the health and welfare of at least the school population segment of the public."(*20*)
>
> "As to the potential loss of state subsidies because of the failure of the schools to operate for the required time, this is, of course, an important factor to be considered in the overall assessment of the effects of such a strike. In *Root v. Northern Cambria School District*, 10 Pa. Common. Ct. 174, 181, 309 A.2d 175, 178 (1974), we said, '(t)he loss of any money needed to support the schools, especially those closed by labor troubles, is clearly a threat to the general welfare and, as *Armstrong* (5 Commonwealth Ct. 378, 291 A.2d 120) suggests, could compel injunctive relief.' This does not mean, of course, that the Legislature intended to put a limit on the number of days that a strike might

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20. Bristol Twp. Education Association v. School Directors of Bristol Twp., 14 Commonwealth 413, 322 A.2d 767 (1974).

> last. Nor does it mean that the mere loss or threatened loss of subsidies is alone sufficient to warrant the enjoining of the strike. It is also necessary to establish that the loss of such subsidies would present a danger or threat to the health, safety or welfare of the public. Here the chancellor specifically found, on the basis of sufficient evidence, that the appellee would be unable to make up all the days lost by the strike and that a continuation of the strike would further aggravate the situation. The subsidy could be lost for the days not made up and there was evidence offered as to the effect of such a possibility. **The chancellor weighed this evidence, as was his responsibility, an determined that the threatened loss of the subsidies would constitute a danger which required that the strike be enjoined. We cannot hold that he erred in so finding.**"*(21)*

Where the chancellor is not satisfied that loss of subsidies is a real threat and is dissatisfied with the proof of inability of the public employer to make up strike lost school days, an injunction has been denied.*(22)*

§9.5 Coercion of "...meet and discuss..." Demands

Not all matters are bargainable under the Public Employe Relations Act:

> Section 702. Public employers **shall not be required to bargain over matters of inherent managerial policy**, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employe representatives.*(23)*

If inherent managerial policy need only be subject to "meet and discuss", the meaning of that phrase becomes critical. It is defined as follows:

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21. Bristol Twp. Education Association, supra, emphasis added.

22. Morris v. Pennsbury School Board et al, 7 PPER 302, C.P., Bucks Co.

23. 43 P.S. §1101.702, emphasis added.

> "Meet and discuss" means the obligation of a public employer upon request to meet at reasonable times and discuss recommendations submitted by representatives of public employes: **Provided, That any decisions or determinations on matters so discussed shall remain with the public employer and be deemed final on any issue or issues raised.**(*24*)

It is apparent that meet and discuss is not bargaining. The public employer needn't agree to anything and what the public employer decides becomes final. It is obvious that meet and discuss is a time for hearing suggestions.(*25*) Since meet and discuss is not bargaining, the limited right to strike granted by Section 1003, 43 P.S. §1101.1003, is unavailable. Further, if the decision of the public employer is to "remain with the public employer, and be deemed final on any issue or issues raised", then a right to strike is logically inconsistent with the public employer's control over the subject.

A strike to enforce a demand for just a meet and discuss item is unlawful. However, what is the nature of a strike initiated when the union has both lawful bargainable demands, and improper meet and discuss demands on the table? Such a strike is tainted by the meet and discuss demands. Employes may be willing to strike to enforce demands for bargainable items and meet and discuss items, but be unwilling to strike for just the bargainable items. Further, in the public sector, the union may use nonbargainable meet and discuss items to deceive the public as to its real demands. Although there are no cases on this subject, legitimate strikes for bargainable demands may well be unlawful because the union is also striking for meet and discuss items.

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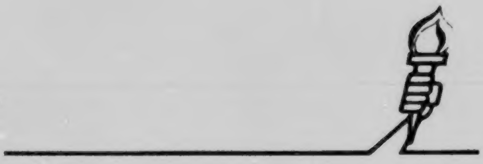
24. 43 P.S. §1101.301 (17).

25. Brownsville Area S.D., 3 PPER 233, 234.



§10. Hearings and Procedure

§10.1 Hearings

PLRB rules govern procedure at hearings. Prehearing conferences are provided for in 34 Pa. Code §95.45. The hearing itself is governed by rules set forth in 34 Pa. Code §95.91 and §93.31. The hearing is conducted by trial examiners designated by the PLRB. Trial examiners are attorneys or laymen knowledgeable in labor law. The trial examiner has broad authority under the rules. He may exclude testimony or other evidence and make various rulings subject to PLRB review. The trial examiner may exclude persons from the hearing for contemptuous conduct and may strike testimony of reluctant witnesses.

Hearings are informal, although a transcript of testimony is prepared.(*1*) Rules of evidence are somewhat loose but are subject to the requirement that orders of the PLRB will not be sustained unless supported "by substantial and legally credible evidence...."(*2*)

The PLRB shows a tendency to hold additional hearings to tie up loose ends. In *St. Joseph Hospital*, 2 PPER 24, a post-election hearing was conducted to decide upon the

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1. 34 Pa. Code §95.91(b).
2. 43 P.S. §1101.1502.

supervisory status of several nurses and to decide the propriety of the inclusion of temporary nurses in the unit. The PLRB noted that this should have been considered in the original hearing. In *Greene Co. Memorial Hospital*, 2 PPER 207, part-time nurses were not included on the eligibility list, and the PLRB held a hearing to decide the eligibility of these part-time nurses and to see if their omission from the list had an impact on the election. Post-election hearings to decide the effect of election misconduct are obviously necessary since there is no earlier time to consider such conduct.

The section of PERA dealing with enforcement of PLRB orders also provides as follows:

> "...If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court, that such additional evidence is material, and that there were reasonable grounds for the failure to adduce such evidence at the hearing before the board, its members or agent, the court may order such additional evidence to be taken before the board, its members or agent and to be made a part of the transcript. The board may modify its findings as to the facts or make new findings by reason of additional...."(*3*)

This section seems equally applicable to the review section of PERA, 43 P.S. §1101.1502, as the courts are directed to "proceed in the same manner as in the case of an application by the board under Section 1501...." The provisions are most helpful to one who uncovers new or previously undiscovered evidence.

§10.2 Procedure

A wide variety of rules of procedure have been established by the PLRB. Requests relative to certification are provided in 34 Pa. Code §95.11 to §95.17. Decertification rules appear in 34 Pa. Code §95.21 and §95.22. Unit clarification rules are explained in 34 Pa. Code §95.23. Unfair labor practices procedures are stated at 34 Pa. Code §95.31 to §95.37. Rules governing service and filing of papers appear at 34 Pa. Code §95.41. Other rules are set forth under other headings and generally need not be explained as they speak for themselves or are dealt with elsewhere.

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3. 43 P.S. §1101.1501.

The PLRB has not required slavish adherence to its rules. Late answers to unfair practice charges have been tolerated.(*4*) Signature of representation petitions by attorneys rather than union officers has been allowed.(*5*) Descriptions of unit personnel in a representation petition as "support personnel" was viewed as sufficiently definite.(*6*)

On the other hand, the PLRB has shown a reluctance to allow amendment of a representation petition at the hearing when this added categories of employes not previously mentioned.(*7*) Amendment was not necessary where events occurred after the filing of the complaint and they showed "possible proof of plan and design as to the current charges".(*8*)

Another procedural point requiring mention concerns who may file unfair practice charges. Section 1302 of PERA states that "any interested party" may file unfair practice charges. The Common Pleas Court of Philadelphia County interpreted this phrase to include a public interest group that was not an employer or an employe or a party to negotiations.(*9*) This holding seems particularly appropriate in that the legislation in question is a Public Employe Relations Act.

However, the PLRB dismissed an unfair labor practice charge filed by a **field representative** of PSSU, the certified union. The PLRB stated that only an employe or the certified union was authorized to file such charges.(*10*)

§10.3 Time Limitations

Section 1505 of PERA provides:

> "...No petition or charge shall be entertained which relates to acts which occurred or statements which were made more than four months prior to the filing of the petition or charge."(*11*)

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4. **Police, Firemen and Park Police Medical Ass'n., Inc.**, 3 PPER 81.
5. **E. Norriton-Plymouth Jt. Sewer Auth.**, 3 PPER 106; **Limerick Twp.**, 2 PPER 127.
6. **Hospital of Univ. of Pennsylvania**, 3 PPER 243.
7. **Millcreek S.D.**, 5 PPER 24; **Boro of Hollidaysburg**, 6 PPER 186.
8. **Millcreek S.D.**, 8 PPER 47.
9. **Parent's Union v. S.D. of Philadelphia**, 6 PPER 178.
10. **Com. of Pennsylvania**, 8 PPER 116.
11. 43 P.S. §1101.1505.

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The PLRB has noted that this period of limitations does not apply to unit clarification petitions and the language of the section would raise a question as to whether it applied to any representation problems.(*12*) The PLRB has also noted that the burden is upon the charging party to show that the event complained of occurred within the four-month period of limitations.(*13*)

Just when an unfair labor practice may be deemed to have occurred and whether it is continuing is an important point. In some cases, the occurrence of the unfair labor practice, and the duty to act is quite clear. In one case, there was an allegation of improper pay raises that occurred 17 months before the filing of the charge. The board said the violation was not continuing and that the charge was too late.(*14*) The date of suspension of certain employes was the date of suspension in *Rose Tree-Media S.D.*, 4 PPER 153. In *Teamsters Local Union No. 8*, 1 PPER 137, a public employe complained that the maintenance of membership provision compelled her to join the union, in violation of her rights to decline to join. Since the date of the contract was within four months of her filing the charge, the board regarded the charge as timely. In *Gateway S.D.*, 6 PPER 329, the PLRB regarded the violation as having occurred when the school board took formal action on the subject of a refusal to bargain, which time was within the statute of limitations. In *Eastern York S.D.*, 3 PPER 79, the union was advised of the elimination of the department head positions in February of 1972. No charge was filed until October 20, 1972. This was regarded as untimely. It might have been argued that the unfair labor practice did not occur until the department head positions were actually discontinued. In *Conawago Valley S.D.*, 7 PPER 133, the school district announced what the union regarded as a subject of bargaining in June 1975. The union continued to request bargaining until November 18, 1975, and filed an unfair labor practice charge on January 2, 1976. The board dismissed the charge and stated that the union had exceeded the four-month period of limitations.(*15*)

Commonwealth v. PLRB, 6 PPER 214, ____ Pa. Cmwlth. ____, ____ A.2d ____ (1975), puts forward a very interesting

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12. Churchill Area S.D., 5 PPER 116; affirmed ____ Pa. Cmwlth. ____, ____ A.2d ____ (1977).

13. Scranton Redevelopment Authority, 1 PPER 122.

14. Moon Area S.D., 6 PPER 216.

15. See also Keystone S.D., 8 PPER 142; North Star Education Assn., 8 PPER 5.

problem. In that case, an employe was fired. He had engaged in union activity outside the four-month period and both the PLRB and the Commonwealth Court agreed that evidence of this union activity, prior to the four-month period, could not be used to show that he was fired for union activity. The case was based on a United States Supreme Court decision, *Machinists' Local 1424 v. NLRB*, 362 U.S. 411 (1960). Prior to this decision, the PLRB had said that it could examine events occurring outside the four-month statutory period to determine the bearing they had on the present charge.(*16*) This seems a logical rule in that an employe could engage in union activity, incur the wrath of his employer, who would only need wait for four months after the union activity ceased to terminate the employe with impunity. This does not seem to be the course now followed by the PLRB and other cases agree with the Commonwealth Court decision.(*17*)

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16. Community General Hosp., 6 PPER 85.

17. York Hospital, 3 PPER 159; Barnes-Kasson County Hosp., 4 PPER 48.

§11. Judicial Review

§11.1 Enforcement

Decisions of the PLRB are not self-enforcing. If its orders are ignored, the PLRB must go to court to secure enforcement. This is provided for in Section 1501 of PERA, 43 P.S. §1101.1501, as follows:

> "§1101.1501 Petition to enforce order; notice; power of Commonwealth Court to grant temporary relief, restraining or mandamus order; Supreme Court review.
>
> The board shall except where an employe of the commonwealth is involved have power to petition the court of common pleas of any county wherein the unfair practice in question occurred, or wherein any person charged with the commission of any unfair practice resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and...In the instance of the exception involving the said commonwealth employes, the board shall file its petition in the Commonwealth Court."

The party against whom enforcement is sought may defend and in this fashion secure review of the decision against him in like manner as if he had appealed.

More often, review of PLRB decisions is secured by petition for review filed by the person aggrieved.

§11.2 Petition for Review

Review of PLRB decisions are provided for as follows in PERA:

> "§1101.1502 Review in court of common pleas; Supreme court review.
>
> Any person aggrieved by a final order of the board granting or denying, in whole or in part, the relief sought in any unfair practice case, or by an order certifying or refusing to certify a collective bargaining agent of employes in any representation case, may obtain a review of such order in the court of common pleas of any county where the unfair practice in question was alleged to have been engaged in, or wherein such person or employer in a representation case resides or transacts business, or in the instance of Commonwealth employes in the Commonwealth Court, as the case may be, by filing in such court, within thirty days after the final order has been issued by the board, a written petition praying that the order of the board be modified or set aside... ."

The foregoing section is substantially modified by the Rules of Appellate Procedure (Pa. R.A.P.). Judicial review of governmental determinations, such as those of the PLRB, are subject to these rules.(*1*) Review is obtained by filing a Petition for Review of the PLRB order.(*2*) The time for petitioning for review of PLRB orders is 30 days after entry of the order.(*3*) Other rules as to the form of the petition for review are set forth in the Rules of Appellate Procedure.

In Section 11.4, Findings in Representation Hearings, there is a discussion of the necessity for a final order of the PLRB. The necessity for there being a final order before appeal is applicable to other PLRB proceedings. A question arose as to the proper course to follow when the PLRB dismissed a charge of unfair practice filed by a union against a public employer without issuance of complaint or hearing. Since only the PLRB

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1. Pa. R.A.P. No. 1501 (a) (1).
2. Pa. R.A.P. No. 1511.
3. Pa. R.A.P. No. 1512 (a).

can issue complaints and direct hearings, the union was effectively denied opportunity to have its charge heard. Although the Commonwealth Court recognized the administrative dismissal of the union's charge as being other than the final order contemplated by PERA, it nevertheless decided that it must be treated as a final order from which the union could appeal.(*4*)

The problem was not resolved by merely allowing review of the PLRB's dismissal of the union's charge. The Commonwealth Court recognized a need for a standard to be used in reviewing PLRB administrative dismissals such as this. It borrowed the standard stated in *Blunenschein v. Pittsburgh Housing Authority*, 379 Pa. 566, 573, 109 A.2d 331, 335 (1954) and quoted as follows from that case:

> "(C)ourts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power; they will not inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution. It is true that the mere possession of discretionary power by an administrative body does not make it wholly immune from judicial review, but the scope of that review is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions. That the court might have a different opinion or judgement in regard to the action of the agency is not a sufficient ground for interference; **judicial** discretion may not be substituted for **administrative discretion**." (Emphasis in original.)

In reaching its decision as to the propriety of dismissal of a charge, the court rejected the argument that the PLRB must make an investigation of the charge. If the charge could not be sustained on the basis of the charge forms and other data put before the PLRB, it might be dismissed.

§11.3 Findings of the PLRB as to Facts.

Sections 1501 and 1502 are not affected by the new Rules of Appellate Procedure in one important respect. Both sections state "...findings of the board as to the facts, if supported by

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4. PSSU v. PLRB, 21 Pa. Cmwlth. 580, 367 A.2d 778 (1976).

substantial and legally credible evidence, shall...be conclusive''. This is a difficult, though not impossible, burden to overcome, particularly when one considers the treatment of this rule over the years. There have been no Supreme Court of Pennsylvania decisions defining the scope of judicial review under PERA. Fortunately, the same provisions appears in the Pennsylvania Labor Relations Act(*5*) and under the latter act there have been a number of Pennsylvania Supreme Court cases interpreting the scope of judicial review of an order of the Pennsylvania Labor Relations Board. In *Pennsylvania Labor Relations Board v. Kaufman Department Stores,* (1942), the court described the scope of judicial review of page 400 as follows:

> ''Upon judicial review, however, it is the duty of the court to determine whether the findings of the board are supported by the substantial and legally credible evidence required by the statute and whether the conclusions deduced therefrom are reasonable and not capricious. All orders and decrees of legal tribunals, including those of administrative boards and commissions, must be supported by evidence **sufficient to convince a reasonable mind to a fair degree of certainty**; otherwise our vaunted system of justice would rest upon nothing higher than arbitrary edicts of its administrators. 'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion': *Consolidated Edison Co. v. National Labor Relations Board,* 305 U.S. 197, 229. 'Substantial evidence is more than a scintilla, and must do more than create a suspician of the existence of the fact to be established': *National Labor Relations Board v. Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300. 'The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power'; *National Labor Relations Board v. Thompson Products, Inc.*, 97 Fed.2d 13, 15; *National Labor Relations Board v. Union Pacific Stages, Inc.*, 99 Fed. 2d 153, 177. 'Suspicion may have its place, but certainly it cannot be substituted for evidence'; *Union Trust Co. of Pittsburgh's Petition,* 342 Pa. 465, 20 A.2d 779, 782, 1941.'' Emphasis added.

In *Pennsylvania Labor Relations Board v. Sansom House Enterprises,* 378 Pa. 385, 106 A.2d 404 (1954) and *Pennsylvania*

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5. Act of June 1, 1937, P.L. 1168, as amended, 43 P.S. Sec. 211.1 et seq.

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Labor Relations Board v. Elk Motor Sales, 388 Pa. 173, 130 A.2d 501 (1957), the Pennsylvania Supreme Court restated in entirety the above statement from *Kaufman*, supra, in dealing with the question of scope of judicial review.

The history of scope of review under the Labor-Management Relations Act, 29 U.S.C.A. Sec. 141, et seq., is most significant. Prior to 1947, the act stated that "the findings of the board, if supported by evidence, shall be conclusive". This led "to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in the record evidence of which, when viewed in isolation, substantiated the board's findings".(*6*) Because of this interpretation, the act was amended in 1947 to provide "findings (of the board) with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive".(*7*) The Supreme Court of the United States in *Universal Camera*, supra, clearly stated that under the amended review provisions, the Appellate Courts must take into account contradictory evidence or evidence from which conflicting inferences can be drawn. "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

The necessity of reviewing the record as a whole is part of the duty of the appellate court in determining whether an order of the board is supported by substantial and legally credible evidence under the Public Employe Relations Act and the Pennsylvania Labor Relations Act. This became clear in the Pennsylvania Supreme Court decision in *Pennsylvania Labor Relations Board v. Ficon, Inc.*, 434 Pa. 383, 254 A.2d 3 (1969). In *Ficon*, the court differentiated between scope of review where "mere" evidence was required and scope of review where "substantially and legally credible" evidence was required. Section 9 (a) of the Pennsylvania Labor Relations Act(*8*) which deals with judicial enforcement of board orders, states that the "findings of the board as to the facts, if **supported by evidence**, shall be conclusive". (Emphasis added) The court in *Ficon* held that "mere evidence satisfied this requirement". The court indicates that any evidence in the record supporting the decision of the board would be sufficient to render the appellate court powerless to reverse the board's

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6. Universal Camera Corp. vs. NLRB, 340 U.S. 474, 71 S. Ct. 456 (1951).

7. 29 U.S.C.A. Sec. 160 (e).

8. 43 P.S. Sec. 211.9 (a).

order. This is similar to the position taken by the federal courts prior to the 1947 amendments to the National Labor Relations Act as discussed in *Universal Camera*, supra, and the court in *Ficon* refers to that case in a note. The court in *Ficon*, however, held that the scope of review under Section 9 (b)(*9*) which requires "substantial and legally credible evidence" in support of the PLRB order was much broader and clearly indicated that the reviewing Court must review the record as a whole.

In summary, the court, in reviewing an order of the Pennsylvania Labor Relations Board under the Public Employe Relations Act, must review the record as a whole and determine whether the order of the PLRB is supported by substantial and legally credible evidence. The court must determine whether the evidence as a whole is "sufficient to convince a reasonable mind to a fair degree of certainty".

§11.4 Findings in Representation Hearings.

As previously noted, the PLRB has authority to hold hearings to decide the appropriateness of collective bargaining units and inclusion or exclusion of persons from that unit.(*10*) These hearings are held prior to any election. It may well happen that the public employer or the employe organization is not satisfied with the result of the unit determination or with other finds of the representation hearing set forth in the PLRB's direction of election. Unless the PLRB's decision disposes of the petition as by dismissing it, the order issued at this stage is interlocutory and is not ripe for review by the courts.

If the PLRB hands down a nisi order of dismissal, the proper procedure is to file exceptions to the order.(*11*) If a direction of election is issued, the election conducted and a nisi certification of election issued, this is also subject to exceptions. Exceptions **must** be filed to nisi orders.(*12*) Direct appeal from a nisi order without resort to the prescribed exceptions warrants dismissal of the request for review.(*13*) This would be

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9. 43 P.S. 211.9 (b).
10. 43 P.S. §1101.603.
11. 34 Pa. Code §95.98.
12. 34 Pa. Code §95.98.
13. PLRB v. PSSU, Local 668, 23 Pa. Cmwlth. 278, 351 A.2d 288 (1976).

so whether the nisi order be entered in an unfair labor practice case or in a representation matter.(*14*)

After exceptions to the nisi order of certification or refusal of certification of the employe representative for the bargaining unit are disposed of, only then is the case ripe for appeal to the courts. Section 1502 specifically provides for review of "an order **certifying** or **refusing to certify** a collective bargaining agent of employes in any representation case..." and makes no provision for appeal of interlocutory decisions.(*15*)

The foregoing rule against reveiw of interlocutory decisions presents practical problems. An employer may deny that it is a public employer. The PLRB finds to the contrary, directs an election, enters a nisi and then a final order of certification. On appeal, the courts conclude that it is not a public employer and that the PLRB has no jurisdiction. However, this conclusion is reached only after extended litigation and the tribulations of an election.

On the other hand, there is much to be said for the procedure of the statute. If the employer could appeal every interlocutory ruling of the PLRB, elections could be delayed so long that the employes would give up interest in the union while the dispute dragged on in the courts.

§11.5 Arbitration Decisions

As to the Commonwealth, the Rules of Appellate Procedure allow for appeal of "an award of arbitrators appointed in conformity with statute" in Pa. R.A.P. No. 703. This appeal is treated as an appeal from an administrative agency and provides the 30-day time limit and procedures applicable to petitions for review set forth in Chapter 15 of the Rules of Appellate Procedure. Appropriately enough, the commonwealth files its appeals from arbitrators' awards in the Commonwealth Court.

A nearly identical rule allows for appeal of such arbitrator's awards by public employers other than the

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14. See also **Shannon v. PLRB**, 8 PPER 56.

15. **Get-Set Organization**, 1 PPER 109, 3 Pa. Cmwlth 422, 281 A.2d 475 (1971); **Luzerne Co.**, 1 PPER 112; **Student Services, Inc.**, 6 PPER 172; **York Co.**, C.P., York Co., 6 PPER 262.

Commonwealth to the Courts of Common Pleas within 30 days after the date of the award of the arbitrators.*(16)*

The comments after both of these rules refer to the police and firemen's bargaining act, Act. 111, 43 P.S. §217.1, et seq. as an example of the sort of arbitration awards contemplated by the rules. However, the intent of the rules is broader, and both interest arbitration and contract interpretation arbitration awards are appealable by their terms.*(17)*

Appeal of arbitration awards rendered under Act 111 must have been taken by way of former RJA No. 2101, which stated that this was the exclusive means of appeal. Mandamus was not a proper means of securing review.*(18)* Although the successor rule to RJA No. 2101, RAP No. 703, does not state that it is the exclusive means of review, it does refer to Chapter 15 of the Rules of Appellate Procedure as governing rules, and RAP No. 1502 states that the procedures set forth in that chapter shall be exclusive for appeals governed thereby.

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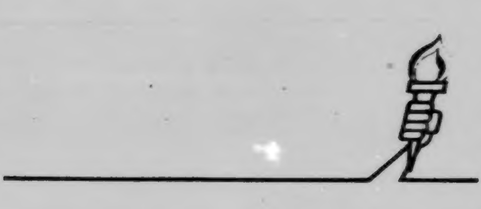
16. Pa. R.C.P. No. 247.

17. Community College of Beaver Co., Society of the Faculty v. Community College of Beaver Co., ___ Pa. ___, ___ A.2d ___ (1977).

18. Skiles v. City of Lancaster, 24 Pa. Cmwlth. 580, 358 A.2d 130 (1976).



§12. Police and Firemen

§12.1 Introduction

Act 111, the police and firemen's bargaining act, 43 P.S. §217.1 et seq., provides that the commonwealth or its policital subdivisions are obliged to bargain "through labor organizations or other representatives designated by 50% or more" of the police or firemen of the governmental unit. The act goes on to establish a system of compulsory interest arbitration, but is lacking in two key areas: 1) it provides none of the machinery for unit determination, elections, protection from unfair practices, etc., found in PERA and 2) there is no definition of "police and firemen".

§12.2 PLRA's Application

The absence of election machinery (and probably the absence of unfair labor practice procedures) has been remedied by *Phila. Fire Officers Ass'n. v. PLRB*, ____ Pa. ____, 369 A.2d 259 (1977). Appellant in that case had gone to the PLRB to secure an election to see if it represented a majority of the Philadelphia firemen who were "arguably" represented by another union. The PLRB declined to conduct an election since 1) Act 111 had no election procedures, 2) PERA, 43 P.S. §1101.301 (2), excluded police and firemen from its coverage and 3) PLRA, excluded public employes from its coverage.(*1*)

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1. 43 P.S. §211.3 (d).

The courts along the way to the Supreme Court sustained the PLRB's conclusion.

The Supreme Court reversed and held that although PERA was not applicable to police and firemen, that the reference to majority representation in Act 111 and the repeal of inconsistent legislation contained in Act 111 led one to the conclusion that PLRA's exclusion of public employes was repealed insofar as concerned police and firemen. Although there is some complaint that the Supreme Court has engaged in judicial legislating, the conclusion is sound and helpful for all concerned. There is now a sensible system for determining the appropriateness of police and firemen units, a procedure for conducting elections among them and very likely a means of treating unfair labor practices that may involve them.

Note, however, that all of this would take place under PLRA, an act similar to PERA, but with enough differences to require study and care to avoid its pitfalls. PLRA will not be discussed in this book because of its similarity to PERA, but that similarity should not be taken for granted.

§12.3 Definition of Police and Firemen

Act 111 does not contain a definition of what are "police" and "firemen." This creates more of a problem than one might imagine in that police duties come in various forms. Certainly the men who arrest criminals are police. However, a small town police force may have long waits between arrests. The policeman walking his beat is a policeman since he is guarding property and keeping the peace. However, the security guard in a high school is performing the same function, but would not seem to be properly classified as a policeman.

There are likely some attributes of the police that the PLRB and the courts will hold critical to the determination that one is a policeman. To see what those attributes are, one must understand the logic behind Act 111.(2)

Act 111 applied to policemen and firemen and it allows collective bargaining but it does not permit strikes. Instead, it provides for compulsory interest arbitration of collective bargaining disputes. This legislation should be considered as written in the context of labor law. Definitions of policemen or

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2. 43 P.S. §217.1, et seq.

references to police powers found in other legislation may be helpful but no more than a definition of "professional" found in the Public School Code is to defining a "professional" under PERA.(*3*) Obviously, the Legislature considered police and fire protection so important to the public that it outlawed the cessation of the service that would result if there were strikes. The definition of police and firemen contemplated for Act 111 should relate to the danger that the Legislature contemplated. Following are suggestions of services unique to the police that would be essential attributes of the required definition.

1. **The general responsibility to keep peace in the community.** Security guards are not police because they have limited areas of patrol. School crossing guards are not police since they have no **general** responsibility for keeping the peace. The dissent in *Twp. of Falls v. PLRB*, 5 PLRB 14, 14 Pa. Cmwlth. 494, 322 A.2d 412 (1974) notes that the Township Code, 53 P.S. §65599A, gives police powers to "special school police". However, crossing guards are so easily replaced that there seems no necessity in making special provisions in **labor laws** to keep them on duty.

2. **The power and responsibility to arrest, etc.** Ordinary citizens have a power to make a citizen's arrest. However, police are trained and relied upon to arrest when conditions are most unstable. In *Venneri, et al. v. County of Allegheny, et al.*, 2 PPER 209 (reversing 1 PPER 94), the Common Pleas Court of Allegheny County notes that deputy sheriffs had this power of arrest and other police powers but did **not** regard them as police because it was not their primary responsibility. The Commonwealth Court also commented on the duties and appearance of general police bestowed upon the deputy sheriffs, but it, too, found their **primary** duty to be related to the needs of the courts. The minor references to police authority of deputy sheriffs were not enough to convince the court that they were indeed policemen.(*4*)

There was a contrary decision with regard to county detectives who are vested with and participated in general police work.(*5*)

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3. **Great Valley S.D.**, 1 PPER 13.

4. **Venneri, et al. v. County of Allegheny, et al.**, 12 Pa. Cmwlth. 517, 316 A.2d 120 (1974).

5. **Hartshorn v. County of Allegheny**, 9 Pa. Cmwlth. 132, 304 A.2d 716 (1973), affirmed Pa. Supreme Court, 460 Pa. 560, 333 A.2d 914 (1975); **Delaware County**, 6 PPER 203.

3. **Training and experience in specific law enforcement.** Highway patrolmen are policemen though they may rarely make arrests or be expected to keep the peace. However, by training and experience, they render a service that the public cannot do without or easily substitute during a strike.(*6*)

4. **Support functions essential to police functions.** The PLRB has decided that dispatchers are not police or firemen.(*7*) The facts of a particular case may cause it to decide otherwise. Obviously, police and firemen depend heavily on radio communications. If the experience of the dispatchers or the complexity of the equipment make dispatchers or other workers essential to adequate police protection, they should be classified as police.

The foregoing are several ideas as to what may guide the PLRB and the courts in defining the terms police and firemen. Basically, the proposed test is what is necessary to protect the public from lawlessness and fire, while at the same time providing the right to strike to nonpolice and nonfiremen.

Matters of little help in defining who are police or firemen are mere use of the titles police or firemen.(*8*) Review of law enforcement duties is the proper inquiry.(*9*) Necessarily, this leads one to an even more troublesome question: When police or fire duties are mixed with other work, how much time must be spent on the excepted work to constitute the individuals police or firemen? Further, to what extent is a policeman or fireman merely waiting to serve in his special capacity when he may busy himself with checking parking meters or helping at school crossings? Considering the necessity of police and fire protection to the public, doubts should be resolved in favor of findings of police and firemen.

§12.4 Bargaining

Bargaining under Act 111 and PERA is mutually exclusive. A labor union cannot elect to follow the provisions of one act

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6. See **West Reading Borough**, 1 PPER 62, where fire apparatus operators were considered firemen.

7. **Richland Twp**., 7 PPER 237.

8. **Commonwealth of Pa.**, 3 PPER 57 and 3 PPER 60; **Venneri, et al v. County of Allegheny, et al.**, 12 Pa. Cmwlth. 517, 316 A.2d 120 (1974).

9. **City of Clairton**, 3 PPER 89; **Lower Merion Twp.**, 3 PPER 291; **Ross Twp.**, 6 PPER 109.

during one year and then follow the provisions of another act during the next year. This conclusion is arrived at by noting that the definition of employe under PERA specifically excludes policemen and firemen under Act 111.(*10*)

The procedure in bargaining is spelled out in Act 111. Collective bargaining shall begin at least six months before the start of the fiscal year of the political unit. A request for arbitration must come at least 110 days before the start of the fiscal year.(*11*) If agreement cannot be reached between the union and the governmental unit, written notice must be directed from one party to the other specifying the issues in dispute and requesting appointment of the Board of Arbitration. Determining when impasse is reached is sometimes difficult, and Act 111 provides that if settlement is not reached within 30 days after collective bargaining has begun, the impasse will be presumed to have occurred. It may also happen that agreement is reached between the union and the bargaining team but that the legislative body, the borough, city or commonwealth, will not ratify and make effective the agreement by legislative action. Act 111 provides for such contingencies by providing that when political subdivisions other than the commonwealth do not approve the agreement within one month after the agreement has been reached, impasse exists. With regard to the commonwealth, the agreement is presumed rejected if it is not approved by the Legislature within six months after agreement is reached by way of collective bargaining.(*12*)

Unlike the time limitations spelled out in PERA, the time limitations of Act 111 are mandatory and they must be complied with. On this point, the Commonwealth Court has stated:

> "It is obvious under the act that time is of the essence in collective bargaining between policemen and firemen and their public employers. While we do not here decide that the legislative requirements cannot be waived by the mutual consent of the parties, doubtful as that may be, it is clear in this case that there was no such consent expressly given, nor can such be implied from any action of the city.

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10. 43 P.S. §1101.301 (2). **FOP v. Shapp**, 22 Pa. Cmwlth. 267, 348 A.2d 502 (1975).

11. 43 P.S. §217.3.

12. 43 P.S. §217.4 (a).

> Act 111, we believe, is designed to protect not only the rights of the collective bargaining agent and of the employer but of the public as well to efficient government through the timely adoption of municipal budgets and of necessary implementing legislation. If the union here had felt that the city was dilatory in commencing negotiations, it should have taken appropriate action to compel compliance within the timetable provisions of the act. Unfortunately, however, although perhaps in good faith, the Union was also dilatory, and has consequently forfeited here its right to binding arbitration by its failure to act in a timely way."(*13*)

The cited case, *Int'l. Ass'n of Firefighters, Local 436 v. City of Johnstown*, supra, was reversed by the Supreme Court.(*14*) However, the basic premise, timely request for bargaining and timely demand for arbitration was not rejected. In fact, the Supreme Court approved the holding in the *Borato* case, supra, where a majority of the union had accepted the collective bargaining agreement before the time for arbitration had passed, and approved the holding in the *Williamsport* case, supra, where the union 1) did not bargain at all before the expiration of the time for requesting arbitration, and 2) was late in requesting arbitration. The Supreme Court noted that in the *Firefighters* case, supra, the union had been timely in requesting bargaining and in stating that if agreement were not reached, that it would request arbitration. The Supreme Court said:

> "We are of the opinion that appellant's request for collective bargaining sessions and appellee's dilatory procedure in scheduling the sessions relieve appellant of the burden of meeting the time scheme set out in Act 111. Moveover, the appellee is not prejudiced by the decision that they must arbitrate the labor contract. Appellee was aware in June of 1974 that the union wished to negotiate a new contract and in September of 1974 that it was seeking binding arbitration."(*15*)

The sense of *Int'l Ass'n. of Firefighters, Local 463 v. City of Johnstown*, supra, is that timeliness in bargaining and in

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13. International Ass'n of Firefighters, Local 463 v. City of Johnstown, 21 Pa. Cmwlth. 223, 344 A.2d 754 (1975). See also Borato v. Boro of Midland, 48 D. & C. 2d 510; and Local 736, v. City of Williamsport, 47 D. & C. 2d 317; Plymouth Twp. Police Dept. v. Plymouth Twp. Commissioners, ____Pa. Cmwlth.____, 366 A.2d 316 (1976).

14. Int'l Ass'n. of Firefighters v. City of Johnstown, ____ Pa. ____, 360 A.2d 197 (1976).

15. ____ Pa. ____, 310 A.2d 197, 198 (1976).

request for arbitration will still be required, but that the employer may not engage in dilatory tactics and expect to hide behind statutory time limits.

§12.5 Scope of Bargaining and Authority of Arbitrators

Just as in the case of PERA, not everything is bargainable under Act 111. That act specifically provides for bargaining about "terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits". This language is similar to, though broader than that found in NLMRA. It should also be noted that there is no reference in Act 111 to "inherent managerial policy" such as exists in PERA.(*16*) However, in one case, the Commonwealth Court applied concepts of inherent managerial policy to police and firemen bargaining.(*17*) This is not entirely inappropriate in that management prerogatives exist under NLMRA and it is not unreasonable for the courts to take a broader view of managerial prerogatives in the public sector.

One case where the Commonwealth Court took a narrow view of the scope of bargaining was *Cheltenham Township, Cheltenham Police Department*, 11 Pa. Cmwlth. 348, 312 A.2d 835 (1973). In that case, a Board of Arbitration had allowed continuation of a practice of picking up police officers in police cars so that they might ride to the police station to begin their day's work. The court said that there was no statutory prohibition on this but that it was not properly a benefit that could and should be bargained and awarded in arbitration.

The broadest prohibition to bargaining under Act 111 is where the matter suggested is limited by statute and where the governmental unit would be prohibited by law from awarding that which is sought in bargaining or that which would be awarded in arbitration. The lead case on this subject is *Washington Arbitration Case*, 436 Pa. 168, 259 A.2d 437 (1969). This is a well-established principle and appears in many cases subsequent to the *Washington Arbitration Case, supra.*(*18*)

Other items have been held to be subjects for bargaining and for an arbitrator's award. It is proper to bargain residency

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16. 43 P.S. §1101.702.

17. Appeal of Ross Twp., 6 PPER 314, 21 Pa. Cmwlth. 251, 346 A.2d 836 (1975).

18. See also, PLRB v. State College Area School District, 6 PPER 92, 461 Pa. 494, 337 A.2d 262 (1975) for a discussion of limitations placed on bargaining by statutes defining benefits for public employees.

requirements for public employes.(19) Shifts, hours of work, deletion of suspension notices and promotion procedures are all proper subjects of collective bargaining.(20) Extra pay based on graduate courses taken by policemen was a proper award of arbitration in *FOP E. B. Jermyn Lodge No. 2 v. City of Scranton*, ____ Pa. Cmwlth. ____, 364 A.2d 753 (1976). The Commonwealth Court also held that an arbitrator's award of $15 for court appearances of off-duty policemen was proper, although an award of $15 **per performance** of off-duty policemen might be in conflict with statute.

Pension and retirement plans are specifically mentioned in the statute as being proper subjects of bargaining. However, arbitrators awarding pension or retirement benefits must have taken into account limitations of the statute. In several cases, arbitrators awards of pension have been upset for failure to take into account actuarial studies.(21) However, *see City of Reading v. Reading Lodge FOP No. 9,* 15 Pa. Cmwlth. 344, 325 A.2d 675 (1974), for a case wherein an arbitrator's award on a pension plan was upheld.

Two important points are decided in *City of Jeannette v. FOP Jeannette Lodge No. 24,* ____ Pa. Cmwlth. ____, 336 A.2d 602 (1976). The first point involved a minimum retirement age set by city ordinance and in conflict with an arbitration award. The Commonwealth Court did not regard this conflict as invalidating the arbitration award and stated that the municipality was allowed by statute to change to minimum retirement age on its pension plan. However, the court noted that it appeared that state statutes would not authorize sufficient contributions to the pension fund to make it solvent. There was not a clear, direct conflict with statute, but rather statutory impediments that seemed to make funding the pensions inpractical when considered in the light of estimated tax receipts. The net effect of this case is to mandate a study of the practicality of pension awards by interest arbitrators.

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19. **Cheltenham Township v. Cheltenham Police Department**, 8 Pa. Cmwlth. 360, 301 A.2d 430 (1973).

20. **Appeal of Ross Township**, 6 PPER 31, 21 Pa. Cmwlth, 241 346 A.2d 836 (1975). **Garvin v. Brentzel**, 54 D. & C.2d 364 (1975).

21. **Cheltenham Township v. Cheltenham Police Department**, 8 Pa. Cmwlth. 360, 301 A.2d 430 (1973); **Appeal of Ross Township**, 6 PPER 314, 21 Pa. Cmwlth. 541, 346 A.2d 836 (1975); **Montgomery Township Police Department v. Montgomery Township Board of Supervisors**, 22 Pa. Cmwlth. 653, 349 A.2d 917 (1976).

Pension rights for state employes are largely removed from the jurisdiction of both interest arbitrators and negotiators by recent amendments.*(22)* The cited statute provides:

> "Pension rights of state employes shall be determined solely by this act or any amendment thereto, and no collective bargaining agreement between the commonwealth and its employes shall be construed to change any of the provisions herein...."

The problem to be corrected is undoubtedly that of piecemeal amendment of the state pension plan by collective bargaining agreements and arbitration awards.

Certain matters have been held to be outside the authority of arbitrators to award. One such matter was a grievance and arbitration procedure which ended in final and binding arbitration.*(23)* In *Flood v. Boro. of Canonsburg, et al,* 8 PPER 78, ____ Pa. Cmwlth. ____, 368 A.2d 348 (1977), the Commonwealth Court concluded that a grievance procedure incorporated in the collective bargaining agreement was not binding on the parties as it was not a proper subject of bargaining. The conclusion of the *Flood* case, supra, is put in question by the holding in *Appeal of City of Bethlehem,* ____ Pa. Cmwlth. ____, 367 A.2d 409 (1976), where a contract interpretation arbitration award under a contract between the city and its firemen was upheld over objections that the city had no authority to enter into an arbitration agreement. Judge Bowman's concurring opinion in the *Bethleham* case, supra, notes the holding in *Allegheny County Firefighters,* supra, but concludes that although an interest arbitrator may not properly award arbitration contract terms, the parties may lawfully agree to arbitrate their differences and be bound thereby.

Also outside the scope of the arbitrator's authority because it lacked a statutory foundation was an insurance policy protecting police officers from liability for false arrest.*(24)* Union security provisions which could result in public employes

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22. 71 Pa. C.S.A. §5955.

23. **Cheltenham Township v. Cheltenham Police Department**, 8 Pa. Cmwlth. 360, 301 A.2d 430 (1973); **Allegheny County Firefighters Local v. Allegheny County**, 7 Pa. Cmwlth. 81, 299 A.2d 60 (1973).

24. **Garbin v. Brentzel**, 54 D. & C.2d 364 (1972).

being terminated for failure to pay dues have been set aside as being beyond the arbitrator's authority.*(25)*

It should be noted that Act 111 specifically makes the determination of the majority of the Board of Arbitration final on the issue or issues in dispute. The act specifically states that no appeal from the decision will be allowed to any court.*(26)* Despite this, the Supreme Court has allowed review of the decisions of arbitrators in the nature of narrow certiorari. This is described in the *Washington Arbitration Case*, 436 Pa. 168, 174; 259 A.2d 436 (1969):

> "If an appeal if prohibited by an act, or the decision of the agency is stated to be final or conclusive, the law is well settled that an appeal will lie to the courts in the nature of a narrow certiorari, and this court will review only (1) the question of jurisdiction; (2) the regularity of the proceedings before the agency; (3) questions of excess in exercise of powers; and (4) constitutional questions:..."

Specific provision is made in court rules for appeal of interest arbitration awards under Act 111.*(27)*

§12.6 Procedure to Compel Bargaining and Arbitration

What should be done when an employer declines to bargain? Seek a writ of mandamus, was the original answer.*(28)* In the *Hartshorn* case, supra, and in the *Venneri* case, supra, one issue was the necessity of seeking a PLRB ruling as to the "police" status of the public employes, before seeking mandamus. Both the Supreme Court and the Commonwealth Court held no such ruling was necessary. However in *FOP v. Shapp*, 22 Pa. Cmwlth., 267, 22 Pa. Cmwlth., 267, 348 A.2d 502 (1975), the alleged "police" were certified under PERA and had bargained two contracts under that act. The Commonwealth Court ruled that mandamus was inappropriate as the status of the employes was not clear. The

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25. Allegheny County Firefighters Local 1038 v. Allegheny County, 7 Pa. Cmwlth. 81, 299 A.2d 60 (1973); Cheltenham Township v. Cheltenham Police Department, 8 Pa. Cmwlth. 360, 301 A.2d 430 (1973).

26. 43 P.S. §217.7 (a).

27. See R.C.P. No. 247 for review of awards in local governmental units and see Rule of Appellate Procedure 703 for review of arbitrator's awards rendered in cases where the commonwealth is a party.

28. Hartshorn v. Co. of Allegheny, 360 Pa. 560, 333 A.2d 914 (1975); Lebanon Lodge FOP No. 42 v. City of Lebanon, et al, 5 Pa. Cmwlth. 56, 288 A.2d 835 (1972); Venneri et al v. Co. of Allegheny et al, 5 Pa. Cmwlth. 105, 289 A.2d 523 (1972).

court suggested that the employes decertify their present bargaining agent and then seek bargaining under Act 111.

The foregoing cases likely have no bearing on employer refusals to bargain as a result of the decision in *Phila. Fire Officers Ass'n. v. PLRB,* ____ Pa. ____, 369 A.2d 259 (1977). If police and firemen are now subject to PLRA, the appropriate remedy for a refusal to bargain by an employer can be found in that act.*(29)*

Different rules apply when the police or firemen refuse to bargain in good faith. Section 2 of Act 111, provides:

> "It shall be the duty of public employers **and their policemen and firemen** employes to settle all disputes **by engaging in collective bargaining in good faith** and by entering into settlements by way of written agreements and maintaining the same."*(30)*

Good faith bargaining is required of both the public employer and the police and firemen by Act 111. On the other hand, there is no refusal to bargain provision in PLRA applicable to unions and comparable to 43 P.S. §211.6 (e). It is suggested that this lack in PLRA is remedied by the cited Section 2 from Act 111 and that a union's refusal to bargain in good faith may be remedied 1) as an unfair practice before the PLRB under PLRA, or 2) by an employer's action in mandamus to compel good faith bargaining, or 3) as a defense to a union's action in mandamus to compel arbitration. As to the third suggestion, the employer who was confronted with a refusal to bargain in good faith could refuse to cooperate in appointment of the Board of Arbitrators, thus compelling the union to resort to mandamus. The public employer could then defend on the basis of the union's refusal to bargain in good faith, as a condition precedent to arbitration.

The foregoing is uncharted territory and must await more court cases for resolution. However, collective bargaining, not arbitration, is to be encouraged and where unions disregard their obligation to bargain in good faith the courts are likely to devise a means of remedying the situation.

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29. 43 P.S. §211.6 (e).

30. 43 P.S. §217.2, emphasis added.

As noted, after collective bargaining, Act 111 allows for compulsory arbitration.(*31*) Where the public employer had refused to negotiate, it was not proper to direct arbitration, but rather an order to negotiate was appropriate.(*32*) When negotiations had reached impasse, arbitration was directed in mandamus actions(*33*) However, in at least one case the police have sought to compel arbitration by use of an injunction.(*34*) It would thus appear that either mandamus or equity would be an appropriate means of compelling a reluctant employer to arbitration.

Objections may arise in the course of the arbitration itself. In *Hanley v. City of Bradford,* 50 D. & C. 2d 152, the employer appointed its city manager as its arbitrator and the union objected. The McKean County Court entertained and granted a petition for removal of the city manager as being too "interested" in the dispute. On the other hand, *Midland Boro. v. Midland Police Dept. et al,* 5 Pa. Cmwlth. 462, 290 A.2d 731 (1972) dealt with an arbitration set outside the time limits specified by Act 111. The lower court had denied a petition for an injunction to enjoin the arbitration since the borough had not established irreparable injury. The Commonwealth Court affirmed the decision of the lower court partly because the court would not interfere with the discretion of the hearing judge as long as there are any apparently reasonable grounds for its refusal to grant the preliminary injunction. Further, the Commonwealth Court agreed with the lower court's conclusion of lack of irreparable injury when it stated:

> "----Here there is no urgency to avoid injury because the borough is not subject to possible liability until the police proceed in mandamus to compel adherence to the arbitration award. There is where the regularity of the arbitration procedure is to be tested."

It is suggested that the McKean County Court was correct in remedying what it preceived as a fault in the arbitration procedure. If it had allowed the arbitration to proceed with the

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31. 43 P.S. §217.4.

32. Worrilow v. Lebanon Lodge FOP No. 42, 288 A.2d 835, 5 Pa. Cmwlth. 56 (1972).

33. Int'l. Ass'n. of Firefighters v. City of Johnstown, ____ Pa. ____, 360 A.2d 197 (1976); Venerri et al v. Co. of Allegheny et al, 5 Pa. Cmwlth. 106, 289 A.2d 523 (1972), and 12 Pa. Cmwlth. 517, 316 A.2d 120 (1974).

34. Plymouth Twp. Police Dept. v. Plymouth Twp. Commissioners, ____ Pa. Cmwlth. ____, 366 A.2d 316 (1976).

suggestion that defects be corrected in a mandamus proceeding or an appeal under R.A.P. No. 703 or R.C.P. No. 247, the arbitration process could be hopelessly snarled in litigation while irregularities were worked out.

§13. Arbitration

§13.1 What is Arbitration?

The term "arbitration" can mean several things in labor relations. Most frequently, arbitration is **contract interpretation** arbitration. This is the arbitration made mandatory by Section 903.(*1*) Contract interpretation arbitration contemplates an existing contract, the interpretation of which is in dispute. By one of several means, the parties to the contract select a third person or persons who will resolve the issue by giving his interpretation of the contract. The contract interpretation arbitrator is, in essence, a judge of contract terms.

This is different from **interest** arbitration, which is also provided for in PERA as voluntary binding (interest) arbitration(*2*) or mandatory binding (interest) arbitration.(*3*) Interest arbitration contemplates an inability of the parties to agree on a collective bargaining agreement. By voluntary agreement or by statutory mandate the parties select a third person or persons who will hear evidence and/or argument from the parties and settle the impasse by **writing** the contract for the parties. The interest arbitrator may be equated to the Legislature writing terms of employment for public employes.

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1. 43 P.S. §1101.903.

2. Section 804; 43 P.S. §1101.804.

3. Section 805; 43 P.S. §1101.805. **See also** the police and fireman bargaining act, 43 P.S. §217.4.

Interest arbitration contrasted with contract interpretation arbitration is a contrast of **writing** the terms against saying what the terms **mean**. There is much confusion in this matter in that writers and legislatures frequently refer only to "arbitration" and leave it to the reader to figure out whether they refer to **interest** or **contract interpretation** arbitration.

One further word is required. Mediators are not arbitrators. Mediators are aides in getting the parties to agree to contract terms. Mediators are required to be appointed if "a dispute or impasse exists" between the parties.(*4*) The mediator will generally meet jointly with the bargaining parties to see what issues separate them. He then meets separately with the employer or the union to see how this bargainer can be accommodated to the other bargainer, with whom the mediator will next meet for the like purpose of determining accommodation. The mediator will try to remove contrived issues from dispute and settle on the issues that are really preventing agreement. When the obstacles are ascertained, the mediator convinces and cajoles the union and employer into a position where their differences are resolved and a contract is agreed to. He doesn't always succeed. He may fail because the parties do not trust him or because he misgauges the issues or perhaps because one or both parties are so set in their positions that he cannot move them from them to accommodation with the other bargainer.

It is obvious that mediators are not interest or contract interpretation arbitrators. They may be mentioned in the same legislation as arbitrators and they may be working at or near the time of the appearance of the arbitrators but they perform different functions and one should know the distinction.

§13.2 Who Should be Selected as an Arbitrator?

The *Steelworkers' Trilogy* suggests that parties seek out arbitrators who know the "law of the shop" and who can render an industrial decision beyond the comprehension of judges. This has a fine ring to it but there seems precious little "law of the shop" in an elementary classroom or in a typing pool at the PUC. It is even harder to find arbitrators who have had any especially relevant experience with public employe "law of the shop". Most arbitrators are lawyers and/or professors or

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4. Section 801; 43 P.S. §1101.801.

professional arbitrators. They develop a knack at resolving grievances as they serve as arbitrators but no more of a knack than is acquired by judges in handling judicial matters.

As a practical matter, experienced labor lawyers or union representatives are more interested in an arbitrator who will rule in his favor than in some abstract thinker who is supposed to know the law of the shop. To anticipate performance of arbitrators, persons who frequently select them will keep records concerning performance of as many arbitrators as they can learn about. Major law firms have alphabetized lists on which current decisions are noted and recent appraisals of arbitrators are entered. In this way, one has a ready source to aid in selecting the best arbitrator for the case. Selection of a good arbitrator is critical. Like all of us, arbitrators may be biased, senile or peculiar. The secret is to select one biased in your favor or at least fair minded. The selection process favors the fair minded, competent arbitrator and one notes that these men are the busy arbitrators and the arbitrators well regarded by both labor and management.

§13.3 The Arbitration Hearing

The following is written for one who has never attended an arbitration hearing. One need not be awed by arbitration. Hearings are conducted with dignified informality, and are consistent with the purpose of simply and fairly resolving working problems. Nevertheless, one must be prepared for the hearing. Witnesses should have been interviewed. They should know what questions will be asked them. The questioner should know how his witnesses will answer and should anticipate and prepare for the testimony of the other party. Documents to be used in evidence should be in triplicate; one for the arbitrator, one for opposing counsel and one for one's own files. Attorneys or experienced laymen should represent the parties. The arbitration hearing calls for an experienced advocate and a lack of experience will tell.

The arbitrator will generally ask the grieving party or organization to explain its complaint. The other party should insist upon reasonable clarity and should demand that the grievance be limited to the problem that was raised in the grievance procedure. Some unions have an irritating tendency to raise issues never discussed before or to add novel twists to the grievance that really turn it into the proper subject of a new and different grievance. If the responding party, generally the employer, has objections of variance from the original grievance, or timeliness, or the lack of arbitrability, he should raise the issue as soon as the union has stated the grievance. In some cases, the employer will request a decision on arbitrability before consideration of the merits. Some arbitrators will honor this request but generally they will decide arbitrability and the merits in one opinion.

The hearing will usually begin with the union presenting evidence on its grievance. The employer may cross-examine these witnesses. When the union's case is complete, the employer explains his theory of his defense and presents his witnesses. Both parties are allowed concluding arguments to the arbitrator. In a rare case, the arbitrator will announce his decision at the conclusion of the hearing. More often, he will hand down a written opinion and decision. Contract rules or rules of the American Arbitration Association, incorporated by reference, will set time for the arbitrator to decide. Occasionally, parties will request to file briefs. Sometimes full transcripts of the proceedings are taken by trial reporters. These matters vary with the nature of the case, the parties and contract rules.

§13.4 Refusal to go to Arbitration

Not every problem is arbitrable. Not every labor-management problem is arbitrable. Section 903 of PERA makes mandatory "(a)rbitration of disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement...." Until the parties create a collective bargaining agreement, there is nothing to interpret and nothing is yet mandatory. If a contract is executed and it contains no limitation on the public employer's right to fire employes, the union cannot demand arbitration of the discharge of an employe.*(5)* If a contract makes no reference to military leave, although the subject is covered by a statute, the union may not compel arbitration as it would seek statutory interpretation, not contract interpretation.*(6)*

There can be legitimate disputes on the question of what is arbitrable. When one party refuses to arbitrate, the most frequent solution is for the other party to go to court to compel arbitration. The Pennsylvania Arbitration Act states a

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5. **Plum Boro.** S.D., 6 PPER 148; **Beaver Co. Com. Col.**, 6 PPER 203.

6. However, see **Portage Area** S.D., 6 PPER 31, for statutes incorporated by reference.

procedure for compelling arbitration through the courts.*(7)* This provision did not replace but was cumulative to the common law methods of compelling arbitration.*(8)*

The Pennsylvania Supreme Court seems to have accepted a standard from the *Steelworkers' Trilogy* for determining whether a particular issue is arbitrable:

> "To be consistent with the general policy favoring the arbitration of contractual differences, we believe an order enjoining arbitration of a particular grievance should not be granted unless it may be said with **positive assurance** that the arbitration clause involved is not susceptible to an interpretation that covers the asserted dispute. Cf. *United Steelworkers of America v. Warrior & Gulf Navigation Company*, supra. We are not presented with this factual situation herein."*(9)*

If this is the standard for deciding arbitrability in Pennsylvania, it seems to have deviated somewhat from prior standards stated as follows:

> "...Our determination in this matter is governed by two basic propositions: (1) that arbitration agreements are to be strictly construed and that such agreements should not be extended by implication: (citations omitted), and (2) that when the parties agree to arbitration in a clear and unmistakable manner, then every reasonable effort will be made to favor such agreements. (citations omitted).*(10)*

Reconciling the *Lincoln* case with prior law in Pennsylvania will have to await another day. *Lincoln* may be the new state of the law or it could be an example of first reaction to the *Steelworkers' Trilogy*. Mention of labor arbitration immediately brings the *Trilogy* to mind. Reflection and study causes one to question that case and to see that the answers given in the *Trilogy* had been given before in other cases. Frequently, the answers of the older cases were more thoughtful and more complete than the answers propounded by Justice Douglas'

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7. 5 P.S. §163.

8. **Joint Board of Waist and Dressmakers' Union of Philadelphia v. Rosinsky**, 173 Pa. Super. 303, 98 A.2d 447 (1953); **John A. Robbins Co., v. Airportels, Inc.**, 418 Pa. 257, 210 A.2d 896 (1965).

9. **Lincoln Sys. of Ed. v. Lincoln Ass'n of Univ. Profs.**, ____ Pa. ____, 354 A.2d 576, 581, 582 (1976), emphasis added.

10. **Emmaus Mun. Authority v. Eltz**, 416 Pa. 123, 125, 204 A.2d 926, 927 (1964).

much cited opinion. Pennsylvania public sector arbitration is less bound by the *Trilogy* than the federal courts and Pennsylvania courts will likely adopt only so much of it as is allowed by statute and justified by logic.

§13.5 PLRB Enforcement of Arbitration Clauses

The PLRB has made an interesting venture into enforcement of contractual arbitration provisions. The PLRB began this effort in *West Mifflin Area School District*, 5 PPER 51 (1974).*(11)* That case involved a negotiated contract and a finding by PLRB that the employer had "unilaterally cut the wages for the coaches to which it had agreed in the contract" to reflect time lost during a strike. The board regarded the combined operation of sections 701, 901, 903 and 1205 (43 P.S. §1101.701, 901, 903 and 1205 (a) (5)), to constitute this action a refusal to bargain. The board then said:

> "After the contract was agreed to and classes resumed, the school board unilaterally reduced the amount to be paid to the coaches in violation of sections 701 and 1205, the requirement to bargain and in violation of Section 903, the mandatory requirement to arbitrate this issue.
>
> We have been reluctant in the past to enforce Section 903 believing that the parties should resort to the courts to obtain specific performance of their contracts under General Contract Law **but the number of instances of parties who are ignoring the requirement for arbitration which are coming to our attention and the need to spell out the ground rules uniformly throughout the commonwealth have convinced us that we must assert our duty to enforce this Section of the act.**
>
> Therefore, we will order the employer in this instance to cease and desist from taking any unilateral action and will also order the employer to agree to arbitration upon request." Emphasis added.

That same day *Port Vue Borough*, 5 PPER 54 (1974) was decided. In that case, the borough declined to even hear a grievance put forth by the Teamsters, although the contract contained a grievance and arbitration procedure. The PLRB notes:

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11. Final order reversing and modifying nisi order, 6 PPER 139.

> "Section 903 of Act 195 provides that arbitration of disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory. The parties so provided in step four of their bargaining agreement. The complainant properly invoked the grievance procedure regarding Miss Wasil's claimed grievance that her layoff violated Article XVIII of the agreement. The respondent denied the grievance, which it had a right to do, and acting in excess of its rights, it refused to discuss the grievance with Miss Wasil's union representative, and refused to refer the matter to arbitration.
>
> Such actions by the respondent amount to a clear violation of Section 1201 (a) (5) of the act, which obligates public employers to bargain in good faith with employe representatives, and also to discuss grievances with such representatives. The clear legislative intention is to enable the board to enforce discussion of grievances in cases where parties have set forth a grievance procedure in their contracts.
>
> The parties have adopted an explicit grievance procedure, employing mandatory arbitration. The respondent should be held to a standard of accountability to at least conform to the contract it executed. See *Timken Roller Bearing Co. v. National Labor Relations Board,* 161 F.2d 949."

This same concept is picked up in the following PLRB cases: *Freedom Area S.D.*, 6 PPER 40; *Bethlehem Area S.D.*, 6 PPER 44; *Upper Darby S.D.*, 6 PPER 132; *Franklin Twp.*, 6 PPER 206; *Forest Hills S.D.*, 6 PPER 250; *Chester Upland S.D.*, 6 PPER 279; *Penn Cambria S.D.*, 6 PPER 294, 6 PPER 332.

The PLRB's decisions appeared based on several misconceptions. The first fault is that Section 903 of Act 195 directs the PLRB to compel arbitration.(*12*) That section merely mandates arbitration of contract interpretation. It does not say who has the power to make a reluctant party go to arbitration. As heretofore noted, the common law and the Pennsylvania Arbitration Act, 5 P.S. §163, and the *Steelworkers' Trilogy*

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12. 43 P.S. §1101.903.

assign that task to the **courts**. With this background, it would seem logical to assume that Section 903 continued the power to enforce arbitration clauses in the courts.

The PLRB appears to recognize the fact that Section 903 does not assign an enforcement chore to it since it says that failure to follow the grievance and arbitration procedure is a violation of Section 1201 (a) (5), 43 P.S. §1101.1201 (a) (5). That section provides:

> "1201 Unfair practices by public employers; acts prohibited
>
> (a) Public employers, their agents or representatives are prohibited from:
>
> (5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, **including but not limited to the discussing of grievances with the exclusive representative.**" (Emphasis added)

There is some logic in this suggestion since discussing grievances is expressly mentioned in the section. However, the PLRB does not seem to understand the distinction between discussing a grievance and going to arbitration. These are two different processes. Discussion of grievances is part of the **negotiating** process. The union comes to the employer and says it disagrees with an interpretation of the contract. The differences are discussed and one or the other party may capitulate. A compromise may be struck. The parties may trade settlement of one grievance, for abandonment of another. Impasse may be reached. If impasse is reached, the matter may be ripe for arbitration. A matter is arbitrated when the parties agree that they **cannot agree**. Negotiations have proved fruitless and the arbitrator's decision must break the impasse. **Arbitration is obviously not part of the bargaining process.**

PLRB has **not** cited NLRB precedent where the NLRB has directed a reluctant party to go to arbitration, where refusal to arbitrate is the **sole** issue. This is so since the NLRB will **not** compel arbitration. There is no lack of precedent for the principal that the NLRB will not enforce arbitration provisions, and the NLRB general counsel must frequently issue "no complaints" when this is the basis of the asserted unfair labor practice, *General Counsel Administrative Ruling No. SR-432* (*1960*), 46 LRRM 1122, *SR-1026* (*1960*), 47 LRRM 1095.

In *Textron Puerto Rico,* 107 NLRB 583, 584 (1953), the NLRB reversed a trial examiner with the following comments:

> "Thus, the record established, at the most, that the respondent refused to comply with the union's request that the respondent submit to arbitration the dispute arising out of that discharge. Whether or not such refusal constituted a breach of the collective-bargaining agreement, it did not, in itself, constitute a violation of Section 8 (a) (5) and (1) of the act. Accordingly, we shall dismiss the complaint."

The NLRB stated in *Sucesion Mario Mercado & Hijos,* 161 NLRB 66 (1966):

> "--Whether or not the respondent's refusal to arbitrate the claim constituted a breach of the collective bargaining agreement, it did not, in itself, constitute a violation of Section 8 (a) (5) and (1) of the act. Accordingly, we shall dismiss the complaint."

In *Central I.U. Public Service Co.,* 139 NLRB 1407, 1418, the NLRB approved a trial examiner's report that stated:

> "Under certain circumstances, perhaps, an employer's refusal to submit a grievance dispute to a theretofore agreed upon arbitration procedure may **in conjunction with other circumstances** provide evidence of bad-faith bargaining. But in this case—leaving aside the earlier unilateral which is an entirely separate matter with which we are not now concerned—there are no such other circumstances. If a finding that the respondent engaged in bad-faith dealing on the union's grievance is to be supported at all, it must rest solely on the respondent's refusal to arbitrate. Whatever my own views on the arbitrability of the dispute may be, I cannot on this record say that the respondent did not genuinely believe that the subject matter of the grievance was ouside the scope of the contract's arbitration provision, or that it urged its position in that regard other than in good faith. The question of the arbitrability of the dispute is now pending before a court of competent jurisdiction, which, rather than the board, is the proper forum for its resolution. Moreover, even if there were no bona fide dispute as to arbitrability, it would not lie within the board's authority, as Congress envisaged it, to treat the violation of the arbitration provision as in itself an unfair labor practice, thereby placing the

> board in a position where it could in effect enforce specific performance of the terms of the arbitration agreement. This is evident from the legislative history of the Taft-Hartley Act on this point, as more fully reflected in the footnote. The views expressed above, also find support in Board precedents. *Textron Puerto Rico (Tricot Division)*, 107 NLRB 583, 584; *United Telephone Company of the West and United Utilities, Incorporated,* 112 NLRB 779, 781-782. See also *International Union, United Mine Workers of America, et. al. (Boone County Coal Corp.) v. NLRB,* 257 F.2d 211 (103 App. D.C. 207).
>
> For the reasons stated above, I conclude that the general counsel has failed to sustain the count of his complaint here specifically under consideration.''(*13*)

At least one Circuit Court of Appeals has ruled that the NLRB is correct in declining to enforce arbitration agreements, and affirmed the NLRB's dismissal of a refusal to bargain a charge based thereon, *Almalgamated Clothing Workers of America, AFL-CIO v. NLRB,* 343 F.2d 329, 51 LC ¶19,511 (1965), enforcing and affirming, 147 NLRB 1151, 1969 CCH-NLRB ¶13,271.

The PLRB is doing what the NLRB has declined to do; enforce **contract terms**. The PLRB has recognized this prohibition when dealing with other problems.(*14*) The Legislature is presumed to know that the NLRB declines to direct parties to go to arbitration, although the PLRB disputes this when it cites *PLRB v. State College Area School District,* 6 PPER 92, 461 Pa. 494, 337 A.2d 262, 264 (1975) for the principle that NLRB principles ''will not necessarily provide a infallable basis for a monolithic model for public employment.''(*15*) The PLRB points out the differences between NLMRA and PERA's description of the duty to bargain. Section 8 (a) (5) of the NLMRA, 29 USCA §158 (a) (5) does not contain the phrase ''including but not limited to the discussing of grievances with the exclusive representative'' that is found in PERA, 43 P.S. §1101.1201 (a) (5). Section 8 (5) (a) does contain a reference to Section 9 (a) of NLMRA, 29 USCA §159 (a) wherein the duty to process grievances is discussed in detail. Section 8 (d) of

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13. See also, Pied Piper Shoe Corp., 172 NLRB 1357.

14. See Scranton School District, 6 PPER 298, 299 (1975).

15. PLRB v. Com. of Pennsylvania, 7 PPER 52 (1976).

NLMRA, 29 USCA §158 (d) defines the duty to bargain as to include "negotiation of an agreement, or **any question arising thereunder**...." These are clear references to grievances. That grievances are part of the collective bargaining process as much under the NLMRA as the PERA is testified to by Justice Douglas in *United Steelworkers v. Warrior and Gulf Nav. Co.*, 363 US 574, 580, 80 S.Ct. 1247, 1351, 1352 (1960).

> "...**The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement.**
>
> Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. **The grievance procedure is, in other words, a part of the continuous collective bargaining process.**" (Emphasis added)

The bold assertion of PLRB that:

> "Most certainly the *discussing of grievances* includes arbitration...,"(*16*)

has a hollow ring to it. It begs the question, "Why?"

Two recent cases bear on the ultimate resolution of the problem discussed above. In *APSCUF v. Commonwealth*, ____ PPER ____, ____ Pa. Cmwlth. ____, 373 A.2d 1175 (1977) the Commonwealth argued that the grievance process did not include arbitration and that it was improper to regard refusal to go to arbitration as a refusal to bargain, with the result that the courts and not the PLRB should order an employer to arbitrate. The Commonwealth Court disagreed with the argument and over the dissent of President Judge Bowman and Judge Mencer, held that "a failure to submit a grievance to binding arbitration is a failure to discuss the grievance for purposes of Section 1201 (a) (5) of the Act."(*17*) The case was remanded to the PLRB for further findings of fact.

The conclusion that refusal to go to arbitration is an unfair practice raises a conflict with several Supreme Court decisions. Unfair practices may be considered **only** by the PLRB, the

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16. PLRB v. Com. of Pa., PERA-C-6932-C, 7 PPER ____ (1976).

17. 43 P.S. §1101.1201 (a) (5).

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agency vested with exclusive authority over unfair practices.*(18)* Nevertheless, the Supreme Court has entertained several cases of refusal to go to arbitration that have come to it under PERA by way of the courts, not from the PLRB.*(19)*

In the most recent review of the arbitrability of a grievance, *Rylke et al v. Portage Area School District*, 8 PPER 91, ____ Pa. ____, 341 A.2d 233 (1977), the Supreme Court had before it the issue of whether mandamus were the proper means by which to have arbitration directed. The court said:

> "...Mandamus will lie only when there is no other legal remedy available, a corresponding right and duty between the parties, and the act requested is purely ministerial and not discretionary. *Porter v. Bloomsburg State College*, 450 Pa. 375, 301 A.2d 621 (1973). The collective bargaining agreement establishes the right of appellants to submit the dispute to arbitration. The ministerial duty of appellee to submit the dispute to binding arbitration also comes from the agreement. Prior to implementation of the agreement, appellants could have utilized the Local Agency Law to challenge the propriety of the suspensions. The parties, however, have by contract agreed that arbitration is their sole remedy. Mandamus was thus the proper form of relief."

Although an unfair practice is not discussed as another remedy to the refusal to arbitrate, the Supreme Court appears to have no difficulty in applying judicial relief in a situation where the PLRB would assert its jurisdiction to be exclusive.*(20)*

§13.6 Standards for PLRB Orders Compelling Arbitration

As noted, there is a question as to the propriety of the PLRB compelling arbitration. However, the PLRB is making orders compelling arbitration and the courts may conclude that this is proper in PERA cases. Further, many PLRB decisions are reasonable and the cases deserve comment. Initially, it

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18. 43 P.S. §1101.1301. See Hollinger et al v. Pa. Department of Public Welfare, et al, 8 PPER 124, ____ Pa. ____, 365 A.2d 1245 (1976).

19. Lincoln University v. Lincoln University Chapter, Ass'n of Univesity Professors, ____ Pa. ____, 354 A.2d 576 (1976); Milberry v. Board of Education, ____ Pa. ____, 354 A.2d 559 (1976) and Board of Education v. Philadelphia Teachers Local 3, 464 Pa. 92, 346 A.2d 35 (1975).

20. Bristol Twp. S.D., 8 PPER 94.

should be observed that if refusal of a public employer to go to arbitration is unfair labor practice, the PLRB has exclusive jurisdiction over the unfair practice.(*21*) Another point made by the PLRB is that the right to "contract interpretation" arbitration is created by statute and cannot be bargained away.(*22*) Also, the PLRB has stated a fundamental rule of the grievance-arbitration system. One does not refuse to do as the employer directs, even though the employe views it as a contract violation. One does the work, and then grieves the alleged contract violation.(*23*)

The PLRB has decided that there is no violation of the "refusal to bargain" section, 43 P.S. §1101.2019 (a) (5), when the union has not grieved according to the contract.(*24*) There is no violation when the employer refuses to process grievances of a minority union.(*25*)

The board rendered a rather improbable decision in *Warwick Bd. of Sch. Directors*, 4 PPER 146, 148, and regarded it as a refusal to bargain to fail to have a union representative present when the superintendent explained to a teacher the school board's position relative to tuition payments and offered payment if a grievance to which the teacher was not a party, were withdrawn. There was no indication that the teacher asked for a union representative, a seemingly critical point. *Abington S. D.*, 6 PPER 182, dealt with the absence of a union representative at a grievance meeting. The case was dismissed as there was "no evidence that the association's case was adversely affected...."

The most important point in situations where the public employer refuses to arbitrate is the extent to which the PLRB will look into the arbitrability of the grievance. The PLRB decisions sometimes say it will not inquire into arbitrability and at other times it makes that precise inquiry.

As noted before, the courts have traditionally decided whether parties have agreed to arbitrate particular matters. If the PLRB is correct in its assertion that it has exclusive

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21. Carlynton S.D., 6 PPER 232; Beaver Co. Com. College, 6 PPER 140; Butler A.S.D., 8 PPER 126.

22. Scranton S.D., 6 PPER 251.

23. Commonwealth, 5 PPER 76.

24. SEPTA, 2 PPER 29; Pa. Turnpike Com., 3 PPER 43; N. Strabane Twp., 5 PPER 85.

25. See 43 P.S. §1101.606 and Baldwin-Whitehall S.D., 3 PPER 40, 42.

jurisdiction over refusals to go to arbitration,(*26*) then the PLRB would be confronted with the question of the applicable standard to use in directing arbitration. As heretofore observed, the Supreme Court seems undecided between the relatively strict, traditional rule in *Emmaus Mun. Authority v. Eltz,* 416 Pa. 123, 204 A.2d 926 (1964) and the broad rule derived from the *Steelworker's Trilogy* and stated in *Lincoln System of Ed. v. Lincoln Ass'n. of Univ. Profs.,* ____ Pa. ____, 354 A.2d 576, 581, (1976).

The PLRB is confused on this point and says:

> Initially, on the question of who decides whether arbitrators have jurisdiction, the courts of this Commonwealth have held that arbitrators have the authority to decide initially whether they have jurisdiction, subject of course to review by an appropriate court. This procedure is consistent with that followed in the Common Pleas Courts of the Commonwealth of Pennsylvania where the trial court initially decides questions of subject-matter jurisdiction on its own motion or that of a party, and questions of jurisdiction over the person on the motion of a party, subject to review by a higher court.(*27*)

The labor board repeats this statement in several cases but never states the court cases it refers to.(*28*) Obviously, an arbitrator can rule on the arbitrability of a case, but where there is a refusal to arbitrate, the court necessarily makes that initial ruling and does **not** leave the ruling up to the arbitrator.

The PLRB has deviated from its assertion that it will not decide arbitrability. In *Plum Boro. S.D.,* 6 PPER 148, it distinguished between "contract interpretation" grievances where arbitration is mandated by Section 903, 43 P.S. §1101.903, and other grievances. It said it would direct arbitration of only the "contract interpretation" grievances.(*29*) In several other cases the PLRB has discussed and rejected arguments to the effect that grievances were not

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26. Beaver Co. Com. College, 6 PPER 140.

27. Freedom Area S.D., 6 PPER 40.

28. Marion Center S.D., 6 PPER 237, Mifflin Co. S.D., 7 PPER 55, Ligonier Valley S.D., 7 PPER 5, Penn Cambria S.D., 6 PPER 294, 7 PPER 54, Portage Area S.D., 6 PPER 331, 7 PPER 110, Forest Hills S.D., 6 PPER 332, Shippensburg Area S.D., 6 PPER 349.

29. See also Scranton S.D., 6 PPER 251.

arbitrable.(*30*) Despite the board's disclaimer of ruling on arbitrability, it is doing so. What it will rule on varies from case to case. However, it regularly looks to see if there is an issue of contract interpretation.(*31*)

There are several nice questions that the PLRB has sidestepped and left to the arbitrator for decision: 1) Can the union grieve to secure insurance benefits for the widow of a deceased member?(*32*) 2) Time limits placed on the grievance system.(*33*) 3) Compliance or conflict with the School Code or other statutes.(*34*)

In two cases the PLRB insisted that Section 903, 43 P.S. §1101.903, required arbitration even after the contract had expired. In *Leechburg Area S.D.*, 6 PPER 97 and Bethlehem Area S.D., 6 PPER 44, the board appears to have tossed caution to the winds and ruled on all arbitrability issues.(*35*)

The Commonwealth Court dealt with the question of arbitrability of grievances after expiration of the contract in *Williamsport Area S.D.*, 8 PPER 128, ____ Pa. Cmwlth. ____, 370 A.2d 1240 (1977). The court refused to direct arbitration and reversed the PLRB's order to arbitrate. The court reasoned that since the contract had expired, there was no contractual promise to arbitrate. It further observed that:

> "...Although Section 903 (43 P.S. §1101.903) does require that all collective bargaining agreements contain an appropriate grievance procedure, the law does not itself establish such a procedure and we believe that here, in the absence of either a collective bargaining agreement or other interim understanding between the parties, no mechanism for the resolution of grievances existed at the time here in question."

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30. Union City Area S.D., 6 PPER 194, Carlynton S.D., 6 PPER 232, Forest Hills S.D., 6 PPER 250, Scranton S.D., 6 PPER 251, Abington S.D., 6 PPER 296 (decided under which contract arbitration should take place), Franklin Twp. Mun. San. Auth., 7 PPER 1, Coatesville Area S.D., 7 PPER 79, Chambersburg Area S.D., 7 PPER 206.

31. Upper Darby S.D.,6 PPER 132; Shippensburg Area S.D., 6 PPER 349; Forest Hills S.D., 6 PPER 332; Portage Area S.D., 6 PPER 331; Appalachia Intermediate Unit 8, 8 PPER 75; Dauphin Co. Technical School, 8 PPER 141; Penn Cambria S.D., 6 PPER 294, 7 PPER 54; Mifflin Co. S.D., 7 PPER 55; Marple Newtown S.Directors, 7 PPER 3; Com. of Pa., 7 PPER 33, 7 PPER ____.

32. Marion Center Area S.D., 6 PPER 237, Freedom Area S.D., 6 PPER 40.

33. Ligonier Valley S.D., 7 PPER 5.

34. Union City Area S.D., 6 PPER 194, Carlynton S.D., 6 PPER 232.

35. See also Norristown A.S.D., 8 PPER 108.

The PLRB cases are inconsistent in this area and one may expect the PLRB and the courts to clarify the law in this important matter.

§13.7 Review of Arbitrators' Decisions

Arbitrators' decisions are reviewable in the courts. Too many lawyers have quickly read the *Steelworkers' Trilogy* and concluded that there is no review of arbitrators' decisions. Two important points must be made: 1) the *Steelworkers' Trilogy* is **federal, private** sector labor arbitration, and 2) the *Steelworkers' Trilogy* nowhere denies review of arbitrators' decisions. As to the first point, this book is concerned with **state, public** sector labor arbitration. The *Trilogy* is not binding in such cases and logical analysis shows much distinction between federal, private sector arbitration and Pennsylvania public sector arbitration. As to the second point, arbitrators' awards *are* reviewable by the courts. We are told this in the *Trilogy:*

> "...Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."(*36*)

As one will note, the United States Supreme Court directs a narrow review, but review of **private** sector **federal** cases is proper. The Pennsylvania courts have no difficulty with allowing review of **public** sector **Pennsylvania** arbitration awards. These are cited in the section on scope of review.

The Pennsylvania Courts have been reviewing arbitrators' decisions with considerable enthusiasm. It had been suggested to the Commonwealth Court that R.J.A. No. 2101 was directed at "interest" arbitration, such as those cases arising under the firemen and policemen bargaining act.(*37*) This contention was rejected in *Com. College of Beaver Co. v. Com. Col. of Beaver Co., Soc. of Faculty* (*PSEA/NEA*), 17 Pa. Cmwlth. 231, 331 A.2d 921 (1975) where the Commonwealth Court applied the

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36. U.S.W. v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597, 60 S.Ct. 1359, 1361, 4 L.Ed. 2d 1424 (1960).

37. Act of June 24, 1968, P.L. 237, No. 111; 23 P.S. §217.1 et seq.

rule to PERA "contract interpretation" arbitration. The Supreme Court agreed with this conclusion in the cited case, ____ Pa. ____, ____ A.2d ____ (1977).

§13.8 Standard of Review in Arbitration Cases

Justice Pomeroy of the Pennsylvania Supreme Court has concisely stated the problem of standard of review in *Int'l Br. of Firemen and Oilers, AFL-CIO, Local 1201 v. School Dist. of Phila.*, Pa. 350 A.2d 807 (1976).

> "The threshold problem in this case, as in any case in which an arbitration decision is challenged, is to determine the standard of judicial review. In arbitration agreements under common law, unless the agreement provides otherwise, the arbitrator is the final judge of both fact and law; his decision will not be set aside 'unless it is alleged and proven by clear, precise and convincing evidence that the parties were denied a hearing or that there was fraud, misconduct, corruption or some other irregularity of this nature on the part of the arbitrator which caused him to render an unjust, inequitable or unconscionable finding.' (Citations omitted)
>
> We have applied the **common law standard** to challenges to arbitration awards in labor disputes. (Citations omitted)
>
> A similarly limited standard of review has been utilized in the field of labor arbitration by the Supreme Court of the United States. *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).
>
> The union stipulated in the court below and concedes in this court that if the common law standard is applicable to this case, its claim is without merit, for its 'complaint' contains no allegations of fraud, misconduct, procedural irregularity or the like. Rather, it merely alleges that the arbitrator misconstrued the collective bargaining agreement between the parties. It is the union's contention, however, that the standard of review which is here applicable is not that of the common law, but is statutorily prescribed by the act of April 25, 1927, P.L. 381, No. 248, §1, 5 P.S. §161 et seq., concerning arbitration pursuant to contractual provisions. Section 11 of the act of 1927, 5 P.S. §171, provides that a court may modify or correct an

> **award, inter alia, '(w)here the award is against the law, and is such that had it been a verdict of the jury the court would have entered a different or other judgment notwith- the verdict.'--"**

Although Justice Pomeroy has stated the problem above, the problem was not resolved in the cited case since the court found that the arbitrator's decision was correct and reasonable no matter what standard was applied. The question of what standard of review--common law, *Steelworkers' Trilogy*, or Pennsylvania Arbitration Act, the act of 1927, 5 P.S. §161 et seq., is answered by the Pennsylvania Supreme Court in *Community College of Beaver County, Society of the Faculty (PSEA/NEA) v. Community College of Beaver County*, ____ Pa. ____, ____ A.2d ____ (1977).

Regarding scope of review, there are several important holdings in the *Community College of Beaver County* case, supra. One holding is that PERA contract interpretation arbitration is indeed subject to the Pennsylvania Arbitration Act of 1927, 5 P.S. §160, et seq. The Supreme Court noted that the act of 1927 flatly provides:

> "The provisions of this act shall apply to any written contract to which the commonwealth of Pennsylvania, or any agency or subdivision thereof, or any municipal corporation or political division of the commonwealth shall be a party."(*38*)

Nothing in PERA mandated the conclusion that the act of 1927, supra, was repealed save in minor inconsistencies.

The Supreme Court held that the standard of review for arbitrator's award under PERA was that set forth in the act of 1927, providing that an arbitrator's award could be modified or corrected:

> "Where the award is against the law, and is such that had it been the verdict of the jury the court would have entered different or other judgment notwithstanding the verdict." (*39*)

The Supreme Court commented on this standard of review of arbitration awards as follows:

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38. 5 P.S. §176.

39. 5 P.S. §171.

> "A court will enter a judgment notwithstanding the verdict if, and only if, viewing all the evidence (including inferences reasonably to be drawn therefrom) most favorably to the verdict winner, the elements of the cause of action or defense asserted have not, as a matter of law, been established. In passing on a motion for judgment n.o.v., findings of fact will not be disturbed if supported by evidence. (citations omitted) While introduction of the 'n.o.v.' concept into the field of arbitration may have been a new departure, it is hardly a radical change, nor does it dictate that a much closer or different scrutiny of an arbitration award will be available than under the approach of *Enterprise Wheel and Car.*"

The court discussed the treatment of findings of fact and legal determinations with regard to a motion n.o.v. and specifically addressed the question of review of arbitrator's awards by the courts as follows:

> "In applying the n.o.v. standard of review of 5 P.S. §171 (d) (award is against the law...) to arbitration awards, we must therefore analyze the role played by the arbitrator in interpreting collective bargaining agreements. From what we have just said it is clear that the arbitrator in all cases in which interpretation of the collective bargaining agreement is called for is deciding a factual question: what the parties intended. The division effected by the common law between ambiguous writings (interpreted by the jury) and unambiguous writings (interpreted by the court as a 'question of law') is logically inapplicable to interpretation questions which arise in arbitration. The policy considerations which compelled the common law to make the division (jury illiteracy, lack of respect for writings, etc.) are absent in the arbitration forum. A fortiori is this true under a statute such as PERA, which mandates arbitration as the exclusive means of interpreting collective bargaining agreements in the first instance. See 43 P.S. §1101.903."

> "To state the matter more precisely, where a task of an arbitrator, PERA or otherwise, has been to determine the intention of the contracting parties as evidenced by their collective bargaining agreement and the circumstances surrounding its execution, then the arbitrator's award is based on a resolution of a question of fact and is to be

respected by the judiciary if 'the interpretation can in any rational way be derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention....' *Ludwig Honold Mfg. Co. v.* Fletcher, 405 F.2d 1123, 1128, (3rd Cir. 1969). It was this approach which was meant to be suggested by the brief statement in *International Brotherhood of Firemen and Oilers,* quoted **supra**, that 'the arbitrator's interpretation of the contract must be upheld if it is a reasonable one.' "(40)

Community College of Beaver County, supra, is not an easy case to follow and it is recommended that the decision be carefully reviewed by the reader. Several points are clear: 1) the n.o.v. standard of review from the Arbitration Act of 1927 is applicable to PERA contract interpretation awards, 2) in the end analysis, that standard is not that different from the standard enunciated in the *Steelworkers Trilogy*, and 3) the Supreme Court will not be overly anxious to overturn the decisions of contract interpretation arbitrators.

§13.9 Enforcement of Arbitration Awards

PERA provides a simple means of enforcement of public sector labor arbitration awards at Section 1201 (a) (8).

> "Section 1201 (a) Public employers, their agents or representatives are prohibited from:
>
> (8) Refusing to comply with the provisions of an arbitration award deemed binding under Section 903 of Article IX."(41)

There is no counterpart to Section 1201 (a) (8) in NLMRA or PLRA. The Pennsylvania Arbitration Act allowed for court enforcement of arbitration awards.(42) It is likely that this section of the Arbitration Act is no longer applicable to arbitration awards rendered in the public sector cases subject to PERA since that act provides:

> Section 1301 **Exclusive power in board to prevent unfair practice.**

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40. 465 Pa. at 366.

41. 43 P.S. §1101.1201 (a) (8). See also 43 P.S. §1101.1201 (b) (8) for the provision applicable to unions.

42. 5 P.S. §169.

> The board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair practice listed in Article XII of this act. This power, shall be exclusive and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. (*43*)

If refusal to comply with an arbitration award is an unfair practice, the above section vests complete authority to enforce that award in the PLRB and in none other. This precise issue has not been addressed by the courts, although the Commonwealth Court has addressed a parallel issue in *PLRB v. Com. of Pennsylvania,* 7 PPER 166, 23 Pa. Cmwlth. 49, 350 A.2d 199 (1976).

In that case, the commonwealth had declined to comply with an adverse arbitration award. The union sought enforcement of the award in the PLRB. The commonwealth protested to the PLRB that the award was void as in excess of the arbitrator's authority. The PLRB noted that the commonwealth had not sought review of the adverse arbitration decision within 30 days after the decision was handed down as required by Rule of Judicial Administration No. 2101 (now R.A.P. No. 703, and R.C.P. No. 247). Since R.J.A. No. 2101 vested exclusive jurisdiction of review of public sector labor arbitration in the Commonwealth Court and since the 30-day time period had passed, the PLRB said it was precluded from any review of the arbitration award and was obliged to enforce it. On appeal to the Commonwealth Court, the court reversed the PLRB and concluded that when the union filed its unfair practice charge, the PLRB became vested with exclusive jurisdiction of the matter and that one element of the unfair practice was that the arbitration award sought to be enforced, be lawful. As the commonwealth challenged the lawfulness of the award, the PLRB was obliged to rule on that challenge.

The Commonwealth Court's ruling seems sound since:

1) The PLRB's grant of exclusive authority over an unfair practice should not have to wait on judicial determination of the validity of arbitration awards. One tribunal, the PLRB, should dispose of the entire problem.

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43. 43 P.S. §1101.1301.

2) There is a question as to whether R.J.A. No. 2101 and its successors are intended to apply to "contract interpretation" arbitration or are rather not directed only at "interest arbitration".

3) The PLRB is the administrative agency most likely to possess the expertise to decide matters arising from labor disputes.

4) Arbitration awards can result in public employers being directed to provide benefits not allowed by law.(*44*) The tribunal directing compliance with arbitration awards should also have the power to see if they are lawful.(*45*)

PLRB v. Com. of Pennsylvania, supra, is on appeal to the Pennsylvania Supreme Court, where the question of extent of review of arbitrator's awards by the PLRB will be determined. However, a brief review of PLRB treatment of these cases is appropriate.

Initially, the PLRB held that once an arbitrator's decision was rendered, it was "binding" and if not complied with, it was totally enforceable.(*46*) This left the board little more to do than rubber stamp the ignored arbitrators' awards as they came through the PLRB offices.(*47*)

Some awards were not enforced for rather obvious reasons: 1) There was insufficient evidence to indicate that there was violation of the award.(*48*) 2) The award was indefinite, ambiguous and impossible of enforcement.(*49*) 3) There was not enough time to implement the award.(*50*) 4) The arbitrator's award was obviously contrary to statute and cases interpreting the statute.(*51*)

One final item requires comment. Section 1201 (a) (8)

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44. Washington Arbitration Case, 436 Pa. 168, 259 A.2d 437 (1969).

45. See PLRB v. Uniontown A.S.D., 8 PPER 24, ____ Pa. Cmwlth. ____ 367 A.2d 738 (1977).

46. Com. of Pa., 5 PPER 5.

47. York Co., 6 PPER 234; Norwin S.D., 6 PPER 275.

48. City of Duquesne, 5 PPER 117; Scranton S.D., 4 PPER 47.

49. Westmont Hilltop S.D., 5 PPER 115; Com. of Pa., 6 PPER 321; Pa. Liquor Control Bd., 6 PPER 321.

50. Sto-Rox S.D., 4 PPER 35.

51. Towanda A.S.D., 8 PPER 69.

refers only to ''an arbitration award deemed binding under Section 903--'', 43 P.S. §1101.1201 (a) (8). It does not mention interest arbitration and the PLRB has found that the section is not applicable to binding arbitration provisions for guards and court personnel set forth in Section 805, 43 P.S. §1101.805.*(52)* Despite this holding, the PLRB found Franklin County guilty of the unfair practice stated in Section 1201 (a) (1), ''interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act''.*(53)* This conclusion seems open to question in the light of the proviso in Section 805, supra, ''that the decisions of the arbitrators which would require legislative enactment to be effective shall be considered advisory only''. The effect of the PLRB holding is to remove the advisory nature of the award.

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52. **Franklin Co.**, 8 PPER 20.

53. 43 P.S. 1101.1201 (a) (1).

§14. Injunctions

Although there has been reference to injunctions in Chapter 9, Strikes, further discussion is appropriate. As discussed in Chapter 9, strikes in violation of mediation and fact finding procedures, and strikes presenting a clear and present danger to the public may be enjoined. Specimen forms for injunction complaints are set forth in the Appendix hereto.(*1*)

There are other strikes that are prohibited and which may be wholly or partly enjoined. Some strikes are prohibited under the terms of PERA. One example is a strike by guards at prisons or mental hospitals.

> §1101.1001 Strikes prohibited; guards and court personnel; equitable relief.
>
> Strikes by guards at prisons or mental hospitals, or employes directly involved with and necessary to the functioning of the courts of this commonwealth are prohibited at any time. If a strike occurs the public employer shall forthwith initiate in the court of common pleas of the jurisdiction where the strike occurs, an action for appropriate equitable relief including but not limited to injunctions. If

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1. See Appendix, Form No. 6., Complaint in Equity (failure to comply with mediation and fact finding requirements), and Form No. 7, Complaint in Equity (clear and present danger to the public).

the strike involves commonwealth employes, the chief legal officer of the public employer or the attorney general where required by law shall institute an action for equitable relief, either in the court of common pleas of the jurisdiction where the strike has occurred or the Commonwealth Court.

See Appendix Form No. 8, Complaint in Equity, (guards at prisons or mental hospitals, or court related employes) for an example of an injunction that may be used to enjoin strikes of guards at prisons or mental hospitals, and court related employes.

Police and firemen are subject to Act 111, 43 P.S. §217.1 et seq. That act makes no provision for strikes and is still subject to the prohibition of 43 P.S. §215.2. See Appendix, Form No. 9, Complaint in Equity, (policemen and firemen) for a complaint that may be used to deal with strikes of police and firemen.

Although not a prohibition on a strike, PERA bars public employes from honoring picket lines set up by unions other than their own, and equates such refusal to cross a picket line to a strike by such employes. See Appendix Form No. 10, Complaint in Equity, (sympathy picketing) for a complaint that may be used to enjoin such refusals to work.

The foregoing strikes are enjoinable under PERA or by virtue of 43 P.S. §215.2. Where any right to strike is denied, the Pennsylvania Anti-Injunction Act likely has little bearing.(2) However, lawful strikes by public employes may become unlawful, and enjoinable under the standards of the Anti-Injunction Act. For example, private sector strikes may be enjoined for mass picketing or because they are sit down strikes, or otherwise met the criteria set forth in 43 P.S. §206i. In summary that section allows an injunction when:

1) unlawful acts have been or will be committed unless restrained

2) substantial and irreparable injury to complainant's property will follow unless relief is granted

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2. 43 P.S. 206a, et seq.

3) greater injury will result to complainant than to respondent unless relief is granted

4) the relief requested is not contrary to 43 P.S. §206f which guarantees certain rights to employes, and

5) complainant has no adequate remedy at law.

A specimen complaint to enjoin violence and mass picketing is set forth in the Appendix, Form No. 11, Complaint in Equity (mass picketing and unlawfulness).

Forms common to all of these injunctions include a Motion for a Preliminary Injunction, Appendix, Form No. 12; two sample forms to be used if the preliminary injunction should not be granted, but rather a time set for hearing on the prayer for an injunction.(*3*)

Before one seeks an injunction he should have a clear idea of the reasons for the injunction and should modify the forms to suit the needs and facts of the particular situation. If one expects the need for an injunction, it should be prepared well in advance of the need and changes made to suit the facts at the time of filing. The relevent statute should be reviewed and the Rules of Civil Procedure studied before one files his complaint.(*4*)

If a preliminary injunction is sought, good practice and professional courtesy require notice to the adverse parties and prompt delivery of the complaint and other pleadings upon the adverse party. Preliminary injunctions require bonds except "when the plaintiff is the commonwealth of Pennsylvania, a political subdivision or a department, board, commission, instrumentality or officer of the commonwealth or of a political subdivision ____"(*5*)

Requests for preliminary injunctions are most frequently supported by affidavits. These should describe facts rather than conclusions. They should be received from persons who saw the events, if possible, and they should be so keyed to the

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3. Appendix, Forms No. 13, and Forms for Preliminary Injunctions keyed to the Complaints for Injunctions.

4. See Pa. R.C.P. No. 1531.

5. Pa. R.C.P. No. 1531 (b).

complaint that the court can feel justified in issuing a preliminary injunction.

The foregoing complaints may be joined as justified by the facts. Failure to follow mediation procedures may coincide with mass picketing. In such case, the two forms, Form No. 6 and Form No. 11, might be joined in one complaint. Facts and circumstances differ so much that one must modify specimen forms to suit the problem.

There are no "final orders". These should be prepared for the court, but except as the court may direct counsel to deviate from the "Preliminary Injunction" forms, it will likely follow that format, excepting such parts as are unique to the preliminary injunction.

APPENDIX 1

Included in this appendix are specimens of forms that are required, or may be used, in various types of actions as noted.

FORMS

Form No. 1, (PLRB) Notification and Request for Election

Form No. 2, (PLRB) Joint Request for Certification

Form No. 3, (PLRB) Joint Election Request

Form No. 4, (PLRB) Petition for Representation by Public Employes, Group of Public Employes or Employe Organization

Form No. 5, (PLRB) Charge of Unfair Practice

Form No. 6, Complaint in Equity, (failure to comply with mediation and fact finding requirements

Form No. 7, Complaint in Equity, (clear and present danger to the public)

Form No. 8, Complaint in Equity, (guards at prisons or mental hospitals, or court related employes)

Form No. 9, Complaint in Equity, (policemen and firemen)

Form No. 10, Complaint in Equity, (sympathy picketing)

Form No. 11, Complaint in Equity, (mass picketing and lawlessness)

Form No. 12, Motion for a Preliminary Injunction

Form No. 13, Order to Show Cause Why a Preliminary Injunction Should Not be Issued, and Order Fixing Time for Hearing

Form No. 14, Preliminary Injunction (failure to comply with mediation and fact finding requirements). Use with Form No. 6

Form No. 15, Preliminary Injunction (clear and present danger to the public). Use with Form No. 7

Form No. 16, Preliminary Injunction (guards at prisons or mental hospitals or court related employes). Use with Form No. 8.

Form No. 17, Preliminary Injunction, (policemen and firemen). Use with Form No. 9.

Form No. 18, Preliminary Injunction, (sympathy picketing). Use with Form No. 10.

Form No. 19, Preliminary Injunction, (mass picketing and lawlessness). Use with Form No. 11.

FORM NO. 1

PERA 603(a)-2 (10-70)

COMMONWEALTH OF PENNSYLVANIA
The Pennsylvania Labor Relations Board

NOTIFICATION AND REQUEST FOR ELECTION

Pursuant to Section 603(a) of the Public Employe Relations Act (name of public employe, group of public employes or employe organization)

Hereby notifies (name of employer) that:

1. 30% or more of the employes of the employer in an appropriate unit desire to be exclusively represented for collective bargaining purposes by the undersigned determined by (state method of determination or desire of 30% or more)

2. The unit deemed appropriate is the employer unit or subdivision of the employer unit comprised of the following classification of employes: (strike out one not applicable)

CLASSIFICATION	NATURE OF WORK	WHERE EMPLOYED	NUMBER OF EMPLOYES

WHEREFORE, the undersigned respectfully requests the employer to join in a Petition to the Pennsylvania Labor Relations Board for an Election.

By

Title

(INCOMPLETE OR INACCURATE STATEMENTS HEREON MAY RESULT IN A DISMISSAL OF THIS PETITION)

FORM NO. 2

PERA 02(a)-1 (10-70)

COMMONWEALTH OF PENNSYLVANIA
The Pennsylvania Labor Relations Board

JOINT REQUEST FOR CERTIFICATION

IN THE MATTER OF THE EMPLOYES OF

DO NOT WRITE IN THIS SPACE
Case No.
Date Filed
ABOVE IS FOR PLRB USE ONLY

TO THE HONORABLE, THE MEMBERS OF THE PENNSYLVANIA LABOR RELATIONS BOARD:

The Petition of the employe representative and the public employer herein respectfully sets forth:

1. That the employe representative is (state name, address, zip code, telephone number and affiliation, if any)

2. That the public employer is (state name, address, zip code, telephone number)

3. That the employer has agreed to recognize the employe representative for collective bargaining purposes pursuant to Section 602(a) of the Public Employe Relations Act based on a determination that a majority of the employes in the proposed unit desire to be represented by the employe representative, which determination is based upon

(state method used to determine the desire of the majority of employes)

4. The unit proposed as appropriate for the purposes of collective bargaining is the employer unit - a subdivision of employer unit (strike out one not applicable) comprised of the following classifications of employes:

CLASSIFICATION	NATURE OF WORK	WHERE EMPLOYED	NUMBER OF EMPLOYES

5. The proposed unit does - does not (strike out one not applicable) contain both professionals and non-professionals as defined by Section 301 (7) of the Public Employe Relations Act, and does-does not (strike out one not applicable) contain guards or other personnel treated at Section 604 (3) of the Public Employe Relations Act, and does not contain any employes at the first level of supervision.

6. The identifiable community of interest of the employes comprising the proposed unit is (state factual grounds such as similarity of duties and working conditions, prior collective bargaining history, extent or organization, etc.)

7. That there are no other employe representatives claiming to represent any of the employes in the proposed bargaining units except

(state name, address, zip code, telephone number or write NONE)

8. The budget submission date for the public employer is ______________________

9. That the public employer has posted the five (5) day Notice required by the Board's Rule 3.1 (h).

10. (Other relevant facts) ______________________

WHEREFORE, Petitioners respectfully pray that the Pennsylvania Labor Relations Board, pursuant to Section 602(a) of the Public Employe Relations Act approve the proposed unit as appropriate for purposes of collective bargaining and certify the employe representative as the exclusive collective bargaining representative for all employes in the unit.

Petitioner - Employe Representative

By ______________________

Title ______________________

Petitioner - Public Employer

By ______________________

Title ______________________

(INCOMPLETE OR INACCURATE STATEMENTS HEREON MAY RESULT IN A DISMISSAL OF THIS PETITION)

FORM NO. 3

PERA 603(b)-3 (10-70)

COMMONWEALTH OF PENNSYLVANIA
The Pennsylvania Labor Relations Board

JOINT ELECTION REQUEST

IN THE MATTER OF THE EMPLOYES OF

DO NOT WRITE IN THIS SPACE
Case No.
Date Filed
ABOVE IS FOR PLRB USE ONLY

TO THE HONORABLE, THE MEMBERS OF THE PENNSYLVANIA LABOR RELATIONS BOARD:

The Petition of the employe representative and the public employer herein respectfully sets forth:

1. That the employe representative is (state name, address, zip code, telephone number)

2. That the public employer is (state name, address, zip code, telephone number)

3. That the employer has received from the employe representative written notification and request for Consent election containing basis of determination of 30% interest, pursuant to Section 603 (a) Public Employe Relations Act on (date) copy of which is attached hereto.

4. That the unit deemed appropriate for purposes of collective bargaining is the employer unit or a subdivision of the employer unit (strike out one not applicable) comprised of the following classification of employes:

CLASSIFICATION	NATURE OF WORK	WHERE EMPLOYED	NUMBER OF EMPLOYES

5. The proposed unit does or does not (strike out one not applicable) contain both professionals and non-professionals as defined by Section 301 (7) of the Public Employe Relations Act, and does or does not (strike out one not applicable) contain guards or other personnel treated at Section 604 (3) of the Public Employer Relations Act, and does not contain any employes at the first level of supervision.

6. The identifiable community of interest of the employes comprising the proposed unit is (state factual grounds such as similarity of duties and working conditions, prior collective bargaining history, extent of organization, etc.)

7. That there are no other employe representatives claiming to represent any of the employes in the proposed bargaining unit except
(state name, address, zip code, telephone number, or write NONE)

8. The budget submission date of the public employer is

9. An agreed alphabetized eligibility list of those entitled to vote is attached hereto. (If there is any question, contact the Board).

10. That the parties hereto desire that the election be held on (date and time period) at (specific location for voting booth)

and attached hereto is an agreed list of watchers.

11. That the public employer has posted the five (5) day Notice required by Board's Rule 3.3 (a) (6).

WHEREFORE, the Petitioners respectfully pray that the Pennsylvania Labor Relations Board, pursuant to Section 603 (b) of the Public Employe Relations Act, order an Election and certify the name of the employe representative designated for purposes of collective bargaining by a majority of the employes in an appropriate unit.

(Public employer)
By ____________________
Title ____________________

(Employe representative)
By ____________________
Title ____________________

(INCOMPLETE OR INACCURATE STATEMENTS HEREON MAY RESULT IN A DISMISSAL OF THIS PETITION)

FORM NO. 4

PERA-4

COMMONWEALTH OF PENNSYLVANIA
The Pennsylvania Labor Relations Board

PETITION FOR REPRESENTATION BY PUBLIC EMPLOYES, GROUP OF PUBLIC EMPLOYES OR EMPLOYE ORGANIZATION

IN THE MATTER OF THE EMPLOYES OF

DO NOT WRITE IN THIS SPACE
Case No.
Date Filed
ABOVE IS FOR PLRB USE ONLY

TO THE HONORABLE, THE MEMBERS OF THE PENNSYLVANIA LABOR RELATIONS BOARD:

The Petition of (public employes, group of employes, or employe organization) ____________________ respectfully sets forth:

1. That the employe representative is (state name, address, zip code, telephone number and affiliation, if any) ____________________

2. That the public employer is (state name, address, zip code, telephone number) ____________________

3. That Petitioner notified the public employer pursuant to Section 603 (a) of the Public Employe Relations Act on (date of receipt) and requested the public employer to join in a Petition for Election and public employer refused said request on ____________________ -- or failed to reply (strike out one not applicable), copy of notification attached hereto.

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4. That the unit deemed appropriate for purposes of collective bargaining is the employer unit or a subdivision of the employer unit (strike out one not applicable) comprised of the following classification of employes:

CLASSIFICATION	NATURE OF WORK	WHERE EMPLOYED	NUMBER OF EMPLOYES

5. The identifiable community of interest of the employes comprising the proposed unit is (state factual grounds such as similarity of duties and working conditions, prior collective bargaining history, extent of organization, etc.)

6. That there are no other employe organizations claiming to represent any of the employes in the proposed bargaining unit except
(state name, address, zip code, telephone number, or write NONE)

7. That Petitioner alleges that 30% or more of the employes in the designated unit desire to be exclusively represented for collective bargaining purposes by Petitioner, determined by
(method used)

8. The proposed unit does or does not (strike out one not applicable) contain both professionals and non-professionals as defined by Section 301 (7) of the Public Employe Relations Act, does or does not (strike out one not applicable) contain guards or other personnel treated at Section 604 (3) of the Public Employer Relations Act, and does not contain any employes at the first level of supervision.

9. The budget submission date for the public employer is

10. Other relevant facts

WHEREFORE, Petitioner respectfully prays that the Pennsylvania Labor Relations Board pursuant to Section 603(c) of the Public Employe Relations Act, send a copy of this Petition to the public employer and provide for an appropriate hearing upon due notice, and approve the proposed unit and issue an order for an election and certify the name of the employe representative designated for purposes of collective bargaining by a majority of the employes in an appropriate unit.

By

Title

(INCOMPLETE OR INACCURATE STATEMENTS HEREON MAY RESULT
IN A DISMISSAL OF THIS PETITION)

FORM NO. 5

PERA-9 (Rev. 7/74)

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA LABOR RELATIONS BOARD

vs.

DO NOT WRITE IN THIS SPACE
Case No.
Date Filed
ABOVE IS FOR PLRB USE ONLY

CHARGE OF UNFAIR PRACTICES

TO THE HONORABLE, THE MEMBERS OF THE PENNSYLVANIA LABOR RELATIONS BOARD:

The Complainant, (name of public employe, employe organization or public employer, address, zip code, telephone number)
by and through ______ (name of person filing charge) ______
its ____ (title) ____

HEREBY CHARGES

that ______ (name of person alleged to have committed unfair practices) ______
of ______ (address, zip code, telephone number) ______
a ______ (public employe, employe organization or public employer) ______

(If more than one Respondent, place X in block ☐ and list on separate sheet) has engaged in unfair practices contrary to the provisions of the Public Employe Relations Act, and more particularly Section 803 and Section 1201, subsection (a) or (b), clause(s) (1), (2), (3), (4), (5), (6), (7), (8), (9), thereof (cross out section/subsection and clauses inapplicable).

SPECIFICATION OF CHARGES

Specific facts, events, dates and grounds in support of such charges are as follows: (Include names, addresses and zip codes of any discharged employes involved, if applicable.)

WHEREFORE, the Complaint respectfully requests the Pennsylvania Labor Relations Board to enter the charge upon the Docket of the said Board and to issue and cause to be served upon the Respondent above named a Complaint stating the charges of unfair practices and containing a Notice of Hearing.

____
(Complainant)

COMMONWEALTH OF PENNSYLVANIA :
: ss
COUNTY OF :

On this ______ day of ______, 197__ before me, a __________, in and for said County and State, personally appeared ____________, who being duly sworn according to law, deposes and says that he is the person filing the foregoing CHARGE OF UNFAIR PRACTICES and that he is aware of the contents thereof and that the matters and facts set forth therein are true and correct to the best of his knowledge, information and belief.

____
(Signature of Affiant)

SWORN AND SUBSCRIBED TO before
me the day and year first aforesaid.

____

FORM NO. 6

Complaint in Equity (failure to comply with mediation and fact finding requirements)

IN THE COURT OF COMMON PLEAS OF
_____________________ COUNTY, PENNSYLVANIA

_____________________ SCHOOL DISTRICT,	
Plaintiff	
vs.	CIVIL ACTION — EQUITY
_____________________ EDUCATION ASSOCIATION and _____________________ STATE EDUCATION ASSOCIATION, unincorporated associations; and	NO. ________ ________ TERM, 19___
_____________________ _____________________ _____________________ _____________________ _____________________ _____________________ _____________________ _____________________	
individually and as trustees ad litem; and all members of the _____________________ Education Association,	
Defendants	

COMPLAINT IN EQUITY

AND NOW comes _________________________________ School District, Plaintiff, and files the following as and for its Complaint in Equity against the defendants, whereof the following is a statement:

1. _________________________________ School District is a School District existing under the laws of the Commonwealth of Pennsylvania and has its administrative office in the Administration Building at _________________________________, and is a public employer under the Public Employe Relations Act.

2. Defendant, _________________________________ State Education Association, is a labor organization, having its district office at _________________________________ _________________________________, herein called ____.S.E.A. or "defendant union", and is an employe organization under the Public Employe Relations Act.

3. Defendant, _________________________________ Education Association, herein called ____.E.A. or "local union", is an unincorporated association of professional employees in the _________________________________ School District and is affiliated with the ____.S.E.A. and is certified by the Pennsylvania Labor Relations Board as the collective bargaining representative of the professional employees in the _____________________ _____________________ School District, and is an employe organization under the Public Employe Relations Act.

4. Defendant, _________________________________ is an individual, with his address at _________________________________, and is District Field Representative of ____.S.E.A.

5. Defendant, ____is an individual, residing at ____, and is president of the local union, ____.E.A.

6. Defendant, ____is an individual, residing at ____, and is chief negotiator of the negotiating team of the local union, ____.E.A.

7. Defendant, ____is an individual, residing at ____, and is a member of the negotiating team of the local union, ____.E.A.

8. Defendant, ____is an individual, residing at ____, and is a member of the negotiating team of the local union, ____.E.A.

9. The defendant members of the ____.E.A. are all members of said association employed as professional employes by the ____ School District below the first level of supervision as defined in the Public Employe Relations Act.

10. On____, 197____, the ______________________School District entered into negotiations with the local union, ____.E.A., relative to terms of employment of the local union's members under the new employment contract to commence ______________________, 197____, the beginning of the school year 197____-7____.

11. The School District and ______.E.A. met on many occasions for the purpose of negotiations and in ____________________________, 197____, voluntarily notified the Pennsylvania Bureau of Mediation to appoint a mediator to assist in their negotiations, as is evidenced by the attached letter dated ____________________, 197____, and marked Exhibit No. A.

12. On or about __________, 197____, the State Mediator, __________________, first met with the parties, and several mediation sessions have been held with the State Mediator since said date.

13. On______________________, 197____, the Bureau of Mediation notified the Pennsylvania Labor Relations Board of the failure of the parties to reach agreement and on__________________, 197____, said Board appointed a fact-finding panel to hold hearings, take oral or written testimony and make findings of fact and recommendations.

On______________________, 197____, said panel notified said Board and the parties of its findings and recommendations. The parties did not accept said recommendations within ten days after they were sent by the panel and said panel publicized said findings and recommendations on ______________________, 197____. Ten days have not elapsed since such publication.

14. At the mediation session scheduled for the evening of______________________, 197____, both the School District and ____.E.A. after several hours of mediation at which all the individual defendants were present, ____ submitted proposals to the State Mediator covering the unresolved issues.

After further bargaining, the (____.E.A. and) ____.S.E.A. through their authorized representatives, the individual defendants, announced they were withholding services and calling for an immediate strike and walked out of the mediation session then in progress.

15. The defendants, acting in concert with each other and the members of the ____.E.A., as of approximately________o'clock a.m., ______________________, 197____, engaged in a work stoppage and strike and commenced picketing the facilities of the ______________________ ________________ School District, so that by reason thereof the School District is unable to conduct an educational program for some ________pupils of the public school system within the District and said schools have been closed.

16. The said strike is unlawful because it occurred during the pendency of fact-finding and mediation and in violation of the Public Employe Relations Act which provides:

> "Section 1002. Strikes by public employes during the pendency of collective bargaining procedures set forth in sections 801 and 802 of Article VIII are prohibited. In the event of a strike during this period the public employer shall forthwith initiate an action for the same relief and utilizing the same procedures required for prohibited strikes under section 1001."

17. Section 1001 of the Public Employe Relations Act provides in part:

> "If a strike occurs the public employer shall forthwith initiate in the court of common pleas of the jurisdiction where the strike occurs, an action for appropriate equitable relief including but not limited to injunctions."

18. Another mediation session between the ____________________________ School District and ____.E.A. has been scheduled by the State Mediator for ________________ at_____o'clock ____.m. and both parties have agreed to attend.

19. With respect to all matters hereinbefore averred, each individual defendant has at all times acted on behalf of himself and as authorized agent of the other individual defendants, the ____.S.E.A., the ____.E.A. and the members of the ____.E.A.

20. The defendants acting in concert are engaged in an unlawful and prohibited strike in violation of Section 1002 of the Public Employe Relations Act in that the strike was called and is continuing during the pendency of collective bargaining procedures and under such circumstances the School District is mandated under Section 1001 of the Public Employe Relations Act to forthwith institute this action to enjoin this unlawful and prohibited strike.

21. That the withholding of services and strike referred to has and will cause the plaintiff and the public to suffer immediate and irreparable damages for which there is no adequate remedy at law and the amount of which cannot now be definitely ascertained, including but not limited to:

(a) plaintiff will be unable to conduct classes for students at some or all of the schools of the School District, with the result that the educational process of said students will be interfered with;

(b) plaintiff and the public will be deprived of the use of its schools, offices, records and equipment;

(c) plaintiff has and will be unable to maintain its equipment and facilities properly;

(d) plaintiff will be unable to meet educational deadlines planned to coincide with other events in the scholastic year and may be threatened with the loss of financial aid from United States Government and/or the Commonwealth of Pennsylvania;

(e) plaintiff will be unable to provide class instruction in a timely manner to students with the result that such students will be inadequately prepared to take college entrance examinations, avail themselves of training programs scheduled for definite times with private industry, and otherwise meet commitments based on the presumption that certain levels of education would be completed at certain times.

(f) ...

22. WHEREFORE, Plaintiff prays:

1. That a preliminary injunction be granted forthwith to be made permanent upon final hearing, restraining and enjoining the defendants and each of them and any and all persons acting in concert with them from:

a. In any manner continuing to strike or withhold services as employes of the plaintiff;

b. Coercing, intimidating, ordering, instigating, inducing, encouraging or otherwise causing the employes of the School District to absent themselves from work;

c. In any manner impeding, obstructing, hampering or interfering with the business of the School District;

d. Advising, encouraging or assisting in the doing of any of the things which are herein forbidden.

2. That defendants cease and desist from engaging in a prohibited strike.

3. That the defendants be ordered to terminate the prohibited strike and direct all of the members of the ____.E.A. to return to work forthwith.

4. That the defendants be ordered to comply with all the provisions of the Public Employe Relations Act and particularly Article VIII thereof.

5. That the Court fix a time for hearing on the Preliminary Injunction prayed for in this Complaint.

6. That the Sheriff of ____________________ County, with the assistance of the local police, be directed to enforce full compliance with the Decree of this Honorable Court, using all of the power vested in them under the law.

7. The Plaintiff be granted such other and further relief as the case may require and as the Court shall deem proper.

8. That the individual defendants, ____________________, ____________________, ____________________, be directed to communicate, or cause to be communicated, prior to ____________ on the ______ day of ______________, 197___, to all members of the union, by means reasonably calculated to insure receipt thereof, the fact that an Injunction Decree has been entered by this Honorable Court and the Contents of said Decree.

And your plaintiff will ever pray.

____________________School District

By:

____________________ Esq.

Pennsylvania
Telephone: ( )
and

Attorneys for ____________________
School District

COMMONWEALTH OF PENNSYLVANIA :
: ss
COUNTY OF :

____________, being duly sworn according to law, deposes and says that he is an officer of plaintiff school district and that as such he is authorized to execute this affidavit in its behalf; that the facts contained in the within Injunction Complaint are true and correct to the best of his knowledge, information and belief.

____

Sworn to and subscribed
before me this day
of , 197 .

____
Notary Public
My Commission Expires:

FORM NO. 7

Complaint in Equity (clear and present danger to the public)

IN THE COURT OF COMMON PLEAS OF
____________________ COUNTY, PENNSYLVANIA

____________________ SCHOOL DISTRICT, Plaintiff vs.	CIVIL ACTION
____________________ EDUCATION ASSOCIATION and ____________________ STATE EDUCATION ASSOCIATION, unincorporated associations: and ________________________________ ________________________________ ________________________________ ________________________________ ________________________________ ________________________________ ________________________________ ________________________________ individually and as trustees ad litem; and all members of the ____________________ Education Association, Defendants	NO. ________ ________ TERM, 19___

COMPLAINT IN EQUITY

AND NOW, comes ____________________ School District, plaintiff, and files the following as and for its Complaint in Equity against the defendants, whereof the following is a statement:

1. ______________________________ School District is a school District existing under the laws of the Commonwealth of Pennsylvania and has its administrative office in the Administration Building at ____, and is a public employer under the Public Employe Relations Act.

2. Defendant, ______________________________ State Education Association, is a labor organization, having its district office at ______________________________, herein called ____.S.E.A., or "defendant union", and is an employe organization under the Public Employe Relations Act.

3. Defendant, __________________________________ Education Association herein called ____.E.A. or "local union" is an unincorporated association of professional employees in the ____ School District and is affiliated with the ____.S.E.A. and is certified by the Pennsylvania Labor Relations Board as the collective bargaining representative of the professional employees in the ____________________ School District, and is an employe organization under the Public Employe Relations Act.

4. Defendant, ____ is an individual, with his address at ____, and is District Field Representive of ____.S.E.A.

5. Defendant, ______________________________ is an individual, residing at ______________________________, and is president of the local union, ____.E.A.

6. Defendant, ______________________________ is an individual, residing at ______________________________, and is chief negotiator of the negotiating team of the local union, ____.E.A.

7. Defendant, ______________________________ is an individual, residing at ______________________________, and is a member of the negotiating team of the local union, ____.E.A.

8. The individual defendants also include all other persons acting in concert with the defendants, individually, collectively or otherwise participating in their aid and in conducting a strike, of the ____________________ School District, ____________________, Pennsylvania. The names of the members of the defendant association are generally unknown to the plaintiff but the number of such members aggregates in excess of ____________________( ) persons and it would be impracticable to name and summon each member as a defendant herein. The interest of such members as a class is fairly and adequately represented by the individual defendants named herein, who are summoned herein both individually and as trustees ad litem and as officers and agents of the defendant associations.

9. On ______________________________, 19____, the ____________________ School District entered into negotiations with the local union, ____.E.A., relative to terms of employment of the local union's members under the new employment contract to commence ____________________, 19____, the beginning of the school year 19____-____.

10. The defendants acting in concert with each other and the members of the ____.E.A., as of approximately ______ o'clock A.M., ____________________, 19____, engaged in a work stoppage and strike and commenced picketing the facilities of the ____________________ School District, so that by reason thereof the School District is unable to conduct an educational program for some ______ pupils of the public school system within the District and said schools have been closed.

11. Since ______________________________, 19____, there have been various acts of lawlessness affecting the ______________________________ School District, as follows:

(a) (enumerate, if any)

12. The plaintiff is obliged by the Constitution and statutes of the Commonwealth of Pennsylvania to provide a thorough and efficient system of public education for the students within the ____________________, Pennsylvania.

13. As a result of said strike, plaintiff has been unable to provide a thorough and efficient system of public education and specific threats and dangers to the health, safety and welfare of the public have arisen as follows:

(a) The school children attending ______________________________ School District schools have been denied adequate instruction during the course of said strike.

(b) Working mothers have been compelled to employ persons to care for their children while schools are closed; such employment imposes on the finances of such working mothers.

(c) ______________________________( ) student days have been lost since the start of the strike; this loss will compel the School District to continue instruction into summer months and on ____________________, 19____, it will begin to be impossible to make up lost student days before the end of the school year.

(d) The failure of the School District to render instruction to its students threatens the ability of the School District to secure state and federal funds to conduct its schools.

(e) Cafeteria workers, bus drivers, and other employes, whose positions at the School District depend on the operation of the schools, are not working and will lose earnings on account of said strike.

(f) Retarded and disturbed students who receive special instruction are being denied instruction.

(g) Students who intend to attend college next summer or fall are receiving instruction from administrators and others not in the bargaining unit, but their educational process has been interrupted and their ability to score well on college board examinations is impaired.

(h) Students with hearing, vision and speech problems, who receive special instruction are being deprived of educational opportunities because of the strike.

(i) School sports, dramatics, and other extracurricular activities are suspended during the strike.

(j) Driver education programs are suspended during the strike.

(k) Community swimming programs, use of basketball courts and other school facilities customarily made available to the community are suspended by the strike.

(l) Adult education programs directed at aiding non-English speaking persons in learning English and attaining high school diplomas or equivalency diplomas are suspended by the strike.

(m) Cooperative work experience programs utilized to enable students to acquire experience in the private workplace before graduation from a high school, have been suspended by the strike.

(n) The free lunch program which supplied a nutritious meal to many children unable to afford an adequate diet has been suspended.

(o) Instruction in pre-natal care and baby care to pregnant students has been suspended.

(p) The graduation date of students entering the job market is postponed by the strike, with the result that plaintiff's students will be late in the competition for available jobs.

(q) Polarization between the community and the school teachers, many of whom are outside the boundaries of the School District, continues to grow, to the detriment of school and community relations.

14. By reason of the foregoing, the plaintiff, its students, involved teachers and the public have suffered immediate and irreparable injury, damage and loss and a clear and present danger and threat is present to the health, safety and welfare of the public.

15. The plaintiff is without adequate remedy at law and a balancing of the right of the defendants to strike and the right of the public to have a competent and efficient school system must be resolved in favor of public welfare.

WHEREFORE, plaintiff, being without any adequate remedy at law and being threatened by irreparable loss, damage, and injury, and the public being confronted with a clear and present danger and threat to its health, safety and welfare, prays your Honorable Court as follows:

1. That a preliminary injunction be granted forthwith to be made permanent upon final hearing, restraining and enjoining the defendants and each of them and any and all persons acting in concert with them from:

a. In any manner continuing to strike or withhold services as employes of the plaintiff;

b. Coercing, intimidating, ordering, instigating, inducing, encouraging or otherwise causing the employes of the School District to absent themselves from work;

c. In any manner impeding, obstructing, hampering or interfering with the business of the School District;

d. Advising, encouraging or assisting in the doing of any of the things which are herein forbidden.

2. That defendants cease and desist from engaging in a prohibited strike.

3. That the defendants be ordered to terminate the prohibited strike and direct all of the members of the ____.E.A. to return to work forthwith.

4. That the Court fix a time for hearing on the Preliminary Injunction prayed for in this Complaint.

5. That the Sheriff of ________________________ County, with the assistance of the local police, be directed to enforce full compliance with the Decree of this Honorable Court, using all of the power vested in them under the law.

6. The plaintiff be granted such other and further relief as the case may require and as the Court shall deem proper.

7. That individual defendants, ____

____

____

be directed to comply with parts 1, 2 and 3 hereof and to communicate, or cause to be communicated, prior to ______________________________ on the ____ day of ______________________________, 19____, to all members of the Union, by means reasonably calculated to insure receipt thereof, the fact that an Injunction Decree has been entered by this Honorable Court and the contents of said Decree.

And your plaintiff will ever pray.

______________________________ School District

By:

____
Esq.

______________________________, Pennsylvania.
Telephone: (   )

and

Attorneys for ______________________________
School District

FORM NO. 8

Complaint in Equity (guards at prisons or mental hospitals or court related employes)

IN THE COURT OF COMMON PLEAS
________________ COUNTY, PENNSYLVANIA

________________ COUNTY,

Plaintiff
vs.

________________ PRISON GUARDS UNION, an unincorporated association and

____
____
____
____
____
____
____
____
____

individually and as trustees ad litem; and all members of the ________________ PRISON GUARDS UNION,

Defendants

CIVIL ACTION

NO. ________ ________ TERM, 19____

COMPLAINT IN EQUITY

AND NOW, comes ________________ County, plaintiff and files the following as and for its Complaint in Equity against the defendants, whereof the following is a statement:

1. ________________ County is a ________________ Class County, existing under the laws of the Commonwealth of Pennsylvania and has its administrative office in the Court House at ________________, and is a public employer under the Public Employe Relations Act.

2. Defendant, ________________ Prison Guards Union is a labor organization, having its office at ________________, herein called "defendant union" and is an employe organization under the Public Employe Relations Act, and is certified by the Pennsylvania Labor Relations Board as the collective bargaining representative of the prison guards in the ________________ County Prison.

3. Defendant, ________________ is an individual residing at ________________, and is president of the defendant union.

4. Defendant, ________________ is an individual residing at ________________, and is chief negotiator of the negotiating team of the defendant union.

5. Defendant, ________________ is an individual residing at ________________, and is a member of the negotiating team of the defendant union. (name all guards if they are not too numerous)

6. The individual defendants also include all other persons acting in concert with the defendants, individually, collectively or otherwise participating in their aid and in conducting a strike, of the ________________ County Prison, ____________________________, Pennsylvania. (The names of the members of the defendant union are generally unknown to plaintiff but the number of such members aggregates in excess of ______( ) persons and it would be impracticable to name and summon each member as a defendant herein. The interest of such members as a class is fairly and adequately represented by the individual defendants named herein, who are summoned herein both individually and as trustees ad litem and as officers and agents of the defendant union.) (delete if all strikers are named)

7. On ____________________________, 19____, ____________________________________ County entered into negotiations with the defendant union relative to terms of employment of the union's members under the new employment contract to commence ______________, 19____, which negotiations continued until ____________________________, 19____.

8. The defendants acting in concert with each other and the other members of the defendant union, as of approximately ______ o'clock A.M., ____________, 19____, engaged in a work stoppage and strike and commenced picketing the facilities of the ______________________ County Prison, so that by reason thereof the proper operation of the prison has been interferred with and the safety of prisoners and the public put into jeopardy.

By reason of the foregoing, the plaintiff, its prisoners, and the public have suffered immediate and irreparable injury, damage and loss for which the plaintiff is without adequate remedy at law.

9. All individual defendants are guards at the ____________________________ County Prison and as such are prohibited from striking by the terms of the Public Employe Relations Act, as follows:

§1001 Strikes prohibited; guards and court personnel; equitable relief.

> Strikes by guards at prisons or mental hospitals, or employes directly involved with an necessary to the functioning of the courts of this Commonwealth are prohibited at any time. If a strike occurs the public employer shall forthwith initiate in the court of common pleas of the jurisdiction where the strike occurs, an action for appropriate equitable relief including but not limited to injunctions. If the strike involves Commonwealth employes, the chief legal officer of the public employer or the Attorney General where required by law shall institute an action for equitable relief, either in the court of common pleas of the jurisdiction where the strike has occurred or the Commonwealth Court. 1970, July 23, P.L. 563, No. 195, art. X, §1001; 43 P.S. §1101.1001.

WHEREFORE, plaintiff prays:

1. That a preliminary injunction be granted forthwith to be made permanent upon final hearing, restraining and enjoining the defendants and each of them and any and all acting in concert with them from:

(a) In any manner continuing to strike or withhold services as employes of the plaintiff;

(b) Coercing, intimidating, ordering, instigating, inducing, encouraging or otherwise causing the guards at the _______________ County Prison to absent themselves from work;

(c) In any manner impeding, obstructing, hampering, the business of the _______________ County Prison.

(d) Advising, encouraging or assisting in the doing of any of the things which are herein forbidden.

2. That the defendants cease and desist from engaging in a prohibited strike.

3. That the defendants be ordered to terminate the prohibited strike and direct all of the members of the ____________________________ Prison Guards Union to return to work forthwith.

4. That the defendants be ordered to comply with the provisions of 43 P.S. §1101.1001.

5. That the Court fix a time for hearing on the Preliminary Injunction prayed for in this Complaint.

6. That the Sheriff of ____________________ County, with the assistance of the local police, be directed to enforce full compliance with the Decree of this Honorable Court, using all the power vested in them under the law.

7. That the plaintiff be granted such other and further relief as the case may require and as the Court shall deem proper.

8. That the individual defendants, ____________________

____

____

be directed to communicate, or cause to be communicated prior to ________ on the ________ day of ____________, 19____, to all members of the defendant, by means reasonably calculated to insure receipt thereof, the fact that an Injunction Decree has been entered by this Honorable Court and the contents of said Decree.

And your plaintiff will ever pray.

____________________ County

By:

____________________ Esq.

Telephone:

and

Attorneys for ____________________
County

FORM NO. 9

Complaint in Equity (policemen and firemen)

IN THE COURT OF COMMON PLEAS OF
____________________ COUNTY, PENNSYLVANIA

____________________ BOROUGH, Plaintiff vs. ____________________ POLICE UNION, and ____________________ ____________________ ____________________ ____________________ ____________________ ____________________ ____________________ individually and as trustees ad litem; and all members of the ____________________ Police Union, Defendants	CIVIL ACTION — EQUITY NO. 19____

COMPLAINT IN EQUITY

AND NOW, comes ______________________________ Borough, plaintiff, and files the following as and for its Complaint in Equity against the defendants, whereof the following is a statement:

1. ______________________________ Borough is a municipality existing under the laws of the Commonwealth of Pennsylvania and has its Administrative Office at ______________________, Pennsylvania.

2. Defendant, ______________________________ Police Union, is a labor organization having an office at ____________________ herein called "defendant union".

3. Defendant, ______________________________, is an individual with his address at ______________________________, Pennsylvania, and is president of ____________________ Police Union.

4. Defendant, ______________________________, is an individual with his address at ______________________________, Pennsylvania, and is steward of ____________________ Police Union.

5. Defendant, ______________________________, is an individual with his address at ______________________________, Pennsylvania.

(In a small police force, name all striking policemen.)

6. All individual defendants are policemen subject to Act No. 111, 43 P.S. §217.1, et seq., and prohibited from striking by virtue of 43 P.S. §215.2 which states:

> "No public employe shall strike and no person exercising any authority, supervision or direction nor any public employe shall have the power to authorize, approve or consent to a strike by one or more public employes."

7. On ______________________________, 19____, said defendants, acting in concert with each other and as members of ______________________________ Police Union, engaged in a work stoppage and strike and commenced picketing the facilities of the plaintiff at ______________________, so that by reason thereof the plaintiff and the public are subject to immediate and irreparable injury for which there is no adequate remedy at law and the amount of which cannot now be definitely ascertained, including but not limited to:

> (a) Plaintiff will be unable to provide for the safety and welfare of its citizens who are and will be threatened with lawless behavior and criminal violence.
>
> (b) Plaintiff will be unable to provide protection to the physical property of the municipality and the property of the citizens of the municpality.
>
> (c) Plaintiff will be unable to adequately regulate the flow of vehicular traffic in the limits of the municipality.

WHEREFORE, plaintiff prays:

1. That a preliminary injunction be granted forthwith to be made permanent upon final hearing, restraining and enjoining the defendants and each of them and any and all acting in concert with them from:

> (a) In any manner continuing to strike or withhold services as employes of the Plaintiff;
>
> (b) Coercing, intimidating, ordering, instigating, inducing, encouraging or otherwise causing the employes of the Borough to absent themselves from work;

(c) In any manner impeding, obstructing, hampering with the business of the Borough;

(d) Advising, encouraging or assisting in the doing of any of the things which are herein forbidden.

2. That the defendants cease and desist from engaging in a prohibited strike.

3. That the defendants be ordered to terminate the prohibited strike and direct all of the members of the ______________________________ Police Union to return to work forthwith.

4. That the defendants be ordered to comply with all the provisions of 43 P.S. §215.2.

5. That the Court fix a time for hearing on the Preliminary Injunction prayed for in this Complaint.

6. That the Sheriff of ______________________________ County, with the assistance of the State Police, be directed to enforce full compliance with the Decree of this Honorable Court, using all the power vested in them under the law.

7. That plaintiff be granted such other and further relief as the case may require and as the Court shall deem proper.

8. That the individual defendants, ____

____

____

be directed to communicate, or cause to be communicated prior to ____________________ on the __________ day of ________________, 197____, to all members of the Union, by means reasonably calculated to insure receipt thereof, the fact that an Injunction Decree has been entered by this Honorable Court and the contents of said Decree.

And your plaintiff will ever pray.

______________________________ BOROUGH

By ______________________________

Esq.

______________________________, Pennsylvania

Telephone (   )

____

Attorneys for Borough

FORM NO. 10

Complaint in Equity (sympathy picketing)

IN THE COURT OF COMMON PLEAS OF
____________________ COUNTY, PENNSYLVANIA

____________________ SCHOOL DISTRICT,	
Plaintiff	
vs.	CIVIL ACTION — EQUITY
____________________ EDUCATION ASSOCIATION AND ____________________ STATE EDUCATION ASSOCIATION, unincorporated associations; and	NO. 19___
____________________ ____________________ ____________________ ____________________ ____________________ ____________________ ____________________ ____________________	
individually and as trustees ad litem; and all members of the ____________________ Education Association,	
Defendants	

COMPLAINT IN EQUITY

AND NOW, comes ____________________ School District, plaintiff, and files the following as and for its Complaint in Equity against the defendants, whereof the following is a statement:

1. ____________________ School District is a School District existing under the laws of the Commonwealth of Pennsylvania and has its administrative office in the Administration Building at ____________________, and is a public employer under the Public Employe Relations Act.

2. Defendant, ____________________ State Education Association is a labor organization, having its district office at ____________________, herein called ____.S.E.A., or "Defendant Union", and is an employe organization under the Public Employe Relations Act.

3. Defendant, ____________________ Education Association, herein called ____.E.A. or "local union" is an unincorporated association of professional employes in the ____________________ School District and is affiliated with the ____.S.E.A. and is certified by the Pennsylvania Labor Relations Board as the collective bargaining representative of the professional employes in the ____________________ School District, and is an employe organization under the Public Employe Relations Act.

4. Defendant, ____________________ is an individual, with his address at ____________________, and is District Field Representative of ____.S.E.A.

5. Defendant, ____________________ is an individual, residing at ____________________, and is president of the local union, ____.E.A.

6. Defendant, ______________________________ is an individual, residing at ______________________________ and is ______________________________ of the local union, _____.E.A.

7. Defendant, ______________________________ is an individual, residing at ______________________________ and is ______________________________ of the local union, _____.E.A.

8. Defendant, ______________________________ is an indivdual, residing at ______________________________ and is a member ______________________________ of the local union, _____.E.A.

9. On ____________________, 19____, ____________________ Education Association, which is the collective bargaining representative of the non-professional employes in the __________ School District, struck said school district and established picket lines at its schools and offices.

10. The individual defendants, public employes of plaintiff, have refused to cross the picket line of ____________________ Association, solely to demonstrate their sympathy for said union and not because they are engaged in a lawful, non-prohibited strike.

11. The said strike and work stoppage is unlawful because it is in violation of Section 1101 of the Public Employe Relations Act which provides:

> "Section 1101. Public employes, other than those engaged in a nonprohibited strike, who refuse to cross a picket line shall be deemed to be engaged in a prohibited strike and shall be subject to the terms and conditions of Article X pertaining to prohibited strikes."

Section 1001 of said Act provides in part:

> "...if a strike occurs the public employer shall forthwith initiate in the court of common pleas of the jurisdiction where the strike occurs, an action for appropriate equitable relief including but not limited to injunctions...".

12. With respect to all matters hereinbefore averred, each individual defendant has at all times acted on behalf of himself and as authorized agent of the other individual defendants, the ____________________ Association, and the other members of the ____________________ Association.

13. By reason of defendants unlawful refusals to cross said picket line and by the concerted and collusive conduct of defendants in preventing other public employes from crossing said picket line, the plaintiff and the public to suffer great and irreparable damages for which there is no adequate remedy at law and the amount of which cannot now be definitely ascertained, including but not limited to:

(a) Plaintiff will be unable to conduct classes for students at some or all of the schools of the School District, with the result that the educational process of said students will be interferred with;

(b) Plaintiff and the public will be deprived of the use of its schools, offices, records and equipment;

(c) Plaintiff has and will be unable to maintain its equipment and facilities properly;

(d) Plaintiff will be unable to meet educational deadlines planned to coincide with other events in the scholastic year and may be threatened with the loss of financial aid from United States Government and/or the Commonwealth of Pennsylvania;

(e) Plaintiff will be unable to provide class instruction in a timely manner to students with the result that such students will be inadequately prepared to take college entrance examinations, avail themselves of training programs scheduled for definite times with private industry and otherwise meet commitments based on the presumption that certain levels of education would be completed at certain times.

WHEREFORE, Plaintiff prays:

1. That a preliminary injunction be granted forthwith to be made permanent upon final hearing, restraining and enjoining the defendants and each of them and any and all persons acting in concert with them from:

(a) In any manner continuing to refuse to cross said picket line or to strike or to withhold services as employes of plaintiff;

(b) Coercing, intimidating, ordering, instigating, inducing, encouraging or otherwise causing the employes of the School District to refuse to cross said picket line or to absent themselves from work;

(c) In any manner impeding, obstructing, hampering or interferring with the business of the School District;

(d) Advising, encouraging or assisting in the doing of any of the things which are herein forbidden.

2. That the defendants cease and desist from engaging in a prohibited refusal to cross said picket line or strike.

3. That the defendants be ordered to refuse to cross said picket line and to terminate the prohibited strike and direct all of the members of the ____.E.A. to return to work forthwith.

4. That the defendants be ordered to comply with all the provisions of the Public Employe Relations Act and particularly Article X and XI thereof.

5. That the Court fix a time for hearing on the Preliminary Injunction prayed for in this Complaint.

6. That the Sheriff of ____________________ County, with the assistance of the local Police, be directed to enforce full compliance with the Decree of this Honorable Court, using all of the power vested in them under the law.

7. That the plaintiff be granted such other and further relief as the case may require and as the Court shall deem proper.

8. That the individual defendants, ______________________________
____
____
be directed to communicate, or cause to be communicated, prior to __________ on the ______ day of __________, 19___, to all members of the Union, by means reasonably calculated to insure receipt thereof, the fact that an Injunction Decree has been entered by this Honorable Court and the contents of said Decree.

And your plaintiff will ever pray.

____________________ SCHOOL DISTRICT

By ____________________
Esq.

____________________, Pennsylvania
Telephone: ( )

Attorneys for ____________________
School District

FORM NO. 11

Complaint in Equity (mass picketing and lawlessness)

IN THE COURT OF COMMON PLEAS OF
____________________ COUNTY, PENNSYLVANIA

____________________ SCHOOL
DISTRICT,

Plaintiff
vs.

____________________ EDUCATION
ASSOCIATION and ____________________
STATE EDUCATION ASSOCIATION,
unincorporated associations; and
____
____
____
____
____
____
____
____
individually and as trustees ad litem; and any other persons acting in concert with them or otherwise participating in their aid,

Defendants

CIVIL ACTION — EQUITY

NO. ________ ________ TERM, 19___

COMPLAINT IN EQUITY

AND NOW comes ____________________ School District, Plaintiff, and files the following as and for its Complaint in Equity against the defendants whereof the following is a statement:

1. ____________________ School District is a School District existing under the laws of the Commonwealth of Pennsylvania and has its administrative office in the Administration Building at ____________________, and is a public employer under the Public Employe Relations Act.

2. Defendant ____________________ State Education Association, is a labor organization, having its district office at ____________________, herein called ____.S.E.A. or "defendant union", and is an employe organization under the Public Employe Relations Act.

3. Defendant, ____________________ Education Association, herein called ____.E.A. or "local union", is an unincorporated association of professional employes in the ____________________ School District and is affiliated with the ____.S.E.A. and is certified by the Pennsylvania Labor Relations Board as the collective bargaining representative of the professional employes in the ____________________ School District, and is an employe organization under the Public Employe Relations Act.

4. Defendant, ____________________ is an individual, with his address at ____________________, and is District Field Representative of ____.S.E.A.

5. Defendant, ____________________ is an individual, residing at ____________________, and is president of the local union, ____.E.A.

6. Defendant, ______________________________ is an individual, residing at ____________________, and is a member of the negotiating team of local union, ____.E.A.

7. Defendant, ______________________________ is an individual, residing at ____________________________, and is the chief negotiator of the local union, ____.E.A.

8. Defendant, ______________________________ is an individual, residing at __________________, and is a member of the negotiating team of the local union, ____.E.A.

9. The individual defendants also include all other persons acting in concert with the defendants, individually, collectively or otherwise participating in their aid at the premises of the ______________________ School District, ______________________, Pennsylvania.

10. On ____, 197____, the ______________________ __________ School District entered into negotiations with the local union, ____.E.A., relative to terms of employment of the local union's members under the new employment contract to commence __________, 197____, the beginning of the school year 197____-7____. After further bargaining, the ____.E.A. and ____.S.E.A. through their authorized representatives, the individual defendants, announced they were withholding services and calling for an immediate strike.

11. The defendants, acting in concert with each other and the members of the ____.E.A., as of approximately ______ o'clock a.m., __________, 197____, engaged in a work stoppage and strike and commenced picketing the facilities of the ______________ School District, so that by reason thereof the School District is unable to conduct an educational program for some ________ pupils of the public school system within the District and said schools have been closed.

12. On or about ____________________, 197____, at approximately ______ o'clock the Associations have interfered with and barred access to plaintiff's premises and have conspired, combined, agreed and arranged with each other to perform and have performed the following acts, all as specified in the affidavits which are attached hereto and made a part hereof:

(a) mass picketing at the entrances to plaintiff's facilities in order to bar access to them;

(b) obstruction of the streets, highways and entranceways in front of and into plaintiff's facilities; and

(c) threatening and intimidating plaintiff's officials and employes in order to prevent them from reporting to work or from using normal entrances to the facilities.

13. On said date, the picket signs carried by the numerous pickets at the various entrances to the plaintiff's facilities carried wording indicating that the dispute of the Associations was ____

____

14. The pickets were and are acting under the direction and control of the defendant Associations and their officers and were caused by said Associations to appear at the entrances to the plaintiff's schools and offices for the purpose of interferring with the use by the plaintiff of its schools and offices therein.

15. The pickets have prevented and continue to prevent free access to the schools and offices by the plaintiff's employes and others who desire to enter and leave the facilities' property.

16. The pickets have engaged in violent actions, interferring with those salaried employes trying to enter the schools and offices and have created an atmosphere of apprehension and intimidation, all of which is more particularly set forth in the Affidavits attached hereto and marked Exhibits No. 1, No. 2, etc.

17. As a result of this delay and interference with the conduct of the education process by the employes of the plaintiff, the plaintiff and the public will suffer great, irreparable damages for which

there is no adequate remedy at law and the amount of which cannot now be definitely ascertained, including but not limited to:

(a) plaintiff will be unable to conduct classes for students at some or all of the schools of the School District, with the result that the educational process of said students will be interferred with;

(b) plaintiff and the public will be deprived of the use of its schools, offices, records and equipment;

(c) plaintiff has and will be unable to maintain its equipment and facilities properly;

(d) plaintiff will be unable to meet educational deadlines planned to coincide with other events in the scholastic year and may be threatened with the loss of financial aid from United States Government and/or the Commonwealth of Pennsylvania;

(e) plaintiff will be unable to provide class instruction in a timely manner to students with the result that such students will be inadequately prepared to take college entrance examinations, avail themselves of training programs scheduled for definite times with private industry, and otherwise meet commitments based on the presumption that certain levels of education would be completed at certain times.

WHEREFORE, plaintiff, being without any adequate remedy at law and being threatened by irreparable loss, damage and injury, requests equitable relief and prays your Honorable Court as follows:

1. That your Honorable Court enter a Decree, preliminarily until hearing and perpetually thereafter, enjoining defendant Associations, their officers, agents, servants, representatives, members and employes, individually and collectively and any other persons acting in concert with them or otherwise participating in their aid at the schools and offices of the ____________ School District, from doing the following acts, or any one of them:

(a) Preventing or attempting to prevent by mass picketing, violence, intimidation or coercion, or any threats thereof, any person or persons having lawful business upon plaintiff's premises from freely entering or leaving plaintiff's premises;

(b) Obstructing, hindering or attempting to obstruct or hinder, ingress or egress from plaintiff's premises by plaintiff's students, officers, agents, employes, representatives and others having business with plaintiff;

(c) Interferring with, hindering or obstructing by mass picketing, violence, intimidation or coercion, or any threats thereof, the operation of plaintiff's schools and offices and the transportation of plaintiff's students or supplies to and from the plaintiff's schools and offices in ________________________________, Pennsylvania, or attempting to do so;

(d) Having in front of or in close proximity to the plaintiff's premises at ________________, Pennsylvania, more than three (3) pickets at any one time, such pickets to be in motion at all times and spaced not less than ten feet apart in a single line and to conduct themselves in such manner as not to block or interfere in any way with the use of such entrances by person or persons desiring to enter or leave said premises on foot or by vehicle.

2. That the Sheriff of ____ County, Pennsylvania, be directed to enforce full compliance with the Decree of this Honorable Court, using all of the power vested in them under the law.

3. The plaintiff be granted such other and further relief as the case may require and as the Court shall deem proper.

4. That the individual defendants, ____
____

____,
be directed to communicate, or cause to be communicated, prior to ______ o'clock on the ________ day of ______________________________, 197____, to all members of the Union, by means reasonably calculated to insure receipt thereof, the fact that an Injunction Decree has been entered by this Honorable Court and the contents of said Decree.

And your Plaintiff will ever pray.

______________________________ School District
By:

____
Esq.

Telephone:
and

Attorneys for ______________________________
School District

FORM NO. 12

(CAPTION)

MOTION FOR PRELIMINARY INJUNCTION

AND NOW, this __________ day of ________________, 197____, comes plaintiff and moves this Honorable Court to enter a preliminary injunction as prayed for in the verified complaint filed herein after hearing.

Respectfully submitted,

____

______________________________ , Pennsylvania
Telephone: (   )
and

____
____
____
Attorneys for ______________________________
School District

FORM NO. 13

(CAPTION)

Order to Show Cause and/or Order Fixing Time

ORDER TO SHOW CAUSE
WHY A PRELIMINARY INJUNCTION SHOULD NOT BE ISSUED

AND NOW, this __________ day of __________________, 197____, upon the verified Complaint (and Affidavits) filed by plaintiff and upon motion of counsel for plaintiff for a Preliminary Injunction, it is ORDERED, ADJUDGED AND DECREED that the named defendants are directed to appear in this Court on the __________ day of ____________________, 197____, at ____.M. in Room __________, County Court House, __________________, Pennsylvania, TO WHOM CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT BE ISSUED as prayed for in plaintiff's Complaint, and it is further ORDERED, ADJUDGED AND DECREED that copies of the Complaint and Motion for Preliminary Injunction and this Order entered thereon be served upon defendants forthwith.

BY THE COURT:

____
J.

(OR IN SOME COUNTIES)
(CAPTION)

ORDER FIXING TIME FOR HEARING

AND NOW, this __________ day of __________________, 197____, upon filing of the Complaint and upon motion of counsel for plaintiff for a preliminary injunction, it is ORDERED, ADJUDGED AND DECREED that a hearing for Motion for Preliminary Injunction be fixed for ________________, 197____, at ________ o'clock ____.M. in Room __________, County Court House, ________________ Pennsylvania, and it is further ORDERED, ADJUDGED AND DECREED that copies of the Complaint and of the Motion for Preliminary Injunction and this Order entered thereon be served upon the defendants forthwith.

BY THE COURT:

____
J.

FORM NO. 14

Preliminary Injunction (failure to comply with mediation and fact finding requirements)

IN THE COURT OF COMMON PLEAS OF
____________ COUNTY, PENNSYLVANIA

____________ ______ SCHOOL
DISTRICT,

Plaintiff
vs.

____________ EDUCATION
ASSOCIATION AND ____________
STATE EDUCATION ASSOCIATION,
unincorporated associations; and
____
____
____
____
____
____
____
____
individually and as trustees ad litem; and all
members of the ____________
Education Association,

Defendants

CIVIL ACTION — EQUITY

NO. ________ ________ TERM, 19___

PRELIMINARY INJUNCTION

AND NOW, this ________ of ____________, 197___, upon the verified complaint and upon consideration of affidavits and argument of counsel in support thereof it is hereby ORDERED, ADJUDGED AND DECREED:

1. That a Preliminary Injunction be granted forthwith restraining and enjoining the defendants and each of them and any and all persons acting in concert with them from:

(a) In any manner continuing to strike or withhold services as employes of the plaintiff;

(b) Coercing, intimidating, ordering, instigating, inducing, encouraging or otherwise causing the employes of the School District to absent themselves from work;

(c) In any manner impeding, obstructing, hampering or interfering with the business of the School District;

(d) Advising, encouraging or assisting in the doing of any of the things which are herein forbidden.

2. That defendants cease and desist from engaging in a prohibited strike.

3. That the defendants terminate the prohibited strike and direct all of the members of the ____.E.A. to return to work forthwith.

4. That the defendants comply with all the provisions of the Public Employe Relations Act and particularly Article VIII thereof.

5. That the Sheriff of ______________ County, with the assistance of the local police enforce full compliance with the Decree of this Court, using all of the Power vested in them under the law.

6. That the individual defendants, ____

____

____

________, communicate, or cause to be communicated, prior to ________________ on the ________ day of ________________, 197____, to all members of the union, by means reasonably calculated to insure receipt thereof, the fact that an Injunction Decree has been entered by this Honorable Court and the contents of said Decree.

7. That this Injunction continue in effect until further order of this Court and the motion for its continuance be heard by the Court on the ________ day of ________________, 197____, at ________________________, Pennsylvania at ______ o'clock in Court Room __________.

BY THE COURT:

____

J.

FORM NO. 15

Preliminary Injunction (clear and present danger to the public)

IN THE COURT OF COMMON PLEAS OF
________________________ COUNTY, PENNSYLVANIA

________________ SCHOOL DISTRICT, Plaintiff vs.	CIVIL ACTION — EQUITY
____________________ EDUCATION ASSOCIATION and ________________ STATE EDUCATION ASSOCIATION, unincorporated associations; and ________________________ ________________________ ________________________ ________________________ ________________________ ________________________ ________________________ ________________________ individually and as trustees ad litem; and all members of the ________________ Education Association, Defendants	No. ________ ________ TERM, 19___

PRELIMINARY INJUNCTION

AND NOW, this ________ day of ________________________, 197____, upon the verified complaint and upon consideration of affidavits and argument of counsel in support thereof it is hereby ORDERED, ADJUDGED AND DECREED:

1. That a Preliminary Injunction be granted forthwith restraining and enjoining the defendants and each of them and any and all persons acting in concert with them from:

(a) In any manner continuing to strike or withhold services as employes of the plaintiff;

(b) Coercing, intimidating, ordering, instigating, inducing encouraging or otherwise causing the employes of the School District to absent themselves from work;

(c) In any manner impeding, obstructing, hampering or interfering with the business of the School District;

(d) Advising, encouraging or assisting in the doing of any of the things which are herein forbidden.

2. That defendants cease and desist from engaging in a prohibited strike.

3. That the defendants terminate their prohibited strike and direct all of the members of the ____.E.A. to return to work forthwith.

4. That the defendants comply with all the provisions of the Public Employe Relations Act.

5. That the Sheriff of ____________________ County, with the assistance of the local Police enforce full compliance with the Decree of this Honorable Court, using all of the power vested in them under the law.

6. That the individual defendants, ____

____

____,
communicate, or cause to be communicated, prior to ____________________ on the __________ day of ________________, 197____, to all members of the union, by means reasonably calculated to insure receipt thereof, the fact that an Injunction Decree has been entered by this Honorable Court and the contents of said Decree.

7. That this Injunction continue in effect until further order of this Court and the motion for its continuance be heard by the Court on the __________ day of ____________________, 197____, at __________________________, Pennsylvania at _____ o'clock in Court Room __________.

BY THE COURT:

____
J.

FORM NO. 16

Preliminary Injunction (guards at prisons or
mental hospitals or court related employes)

IN THE COURT OF COMMON PLEAS
________________ COUNTY, PENNSYLVANIA

________________ COUNTY,

Plaintiff
vs.

________________ PRISON GUARDS UNION, an unincorporated association and
____
____
____
____
____
____
____
____
individually and as trustees ad litem; and all members of the ________________ PRISON GUARDS UNION,

Defendants

CIVIL ACTION

NO. ________ ________ TERM, 19___

PRELIMINARY INJUNCTION

AND NOW, this ________ day of ________________, 197___, upon the verified complaint and upon consideration of affidavits and argument of counsel in support thereof it is hereby ORDERED, ADJUDGED AND DECREED:

1. That a Preliminary Injunction be granted forthwith restraining and enjoining the defendants and each of them and any and all persons acting in concert with them from:

(a) In any manner continuing to strike or withhold services as employes of the plaintiff;

(b) Coercing, intimidating, ordering, instigating, inducing, encouraging or otherwise causing the guards at the ________________ County Prison to absent themselves from work;

(c) In any manner impeding, obstructing, hampering the business of the ________ County Prison.

(d) Advising, encouraging or assisting in the doing of any of the things which are herein forbidden.

2. That the defendants cease and desist from engaging in a prohibited strike.

3. That the defendants terminate the prohibited strike and direct all of the members of the ________________ Prison Guards Union to return to work forthwith.

4. That the defendants comply with the provisions of 43 P.S. §1101.1001.

5. That the Sheriff of ________________ County, with the assistance of the local police enforce full compliance with the Decree of this ________________ Court, using all the power vested in them under the law.

6. That the individual defendants, ______________________________ __________
____
____
communicate, or cause to be communicated, prior to ______________ on the ________ day of ______________, 19____, to all members of the union, by means reasonably calculated to insure receipt thereof, the fact that an Injunction Decree has been entered by this Court and the contents of said Decree.

7. That this Injunction continue in effect until further order of this Court and the motion for its continuance be heard by the Court on the ________ day of ________________, 197____, at ______________________, Pennsylvania at _____ o'clock in Court Room ________.

BY THE COURT:

____
J.

FORM NO. 17

Preliminary Injunction (policemen and firemen)

IN THE COURT OF COMMON PLEAS OF
____________________ COUNTY, PENNSYLVANIA

____________________ BOROUGH, :
:
Plaintiff :
vs. : CIVIL ACTION — EQUITY
:
____________________________ POLICE : NO. 19____
UNION, and ____________________ :
______________________________ :
______________________________ :
______________________________ :
______________________________ :
______________________________ :
______________________________ :
______________________________ :
individually and as trustees ad litem; and all :
members of the ____________________ :
Police Union, :
:
Defendants :

PRELIMINARY INJUNCTION

AND NOW, this ________ day of ______________________, 197____, upon the verified complaint and upon consideration of affidavits and argument of counsel in support thereof it is hereby ORDERED, ADJUDGED AND DECREED:

1. That a Preliminary Injunction be granted forthwith restraining and enjoining the defendants and each of them and any and all persons acting in concert with them from:

(a) In any manner continuing to strike or withhold services as employes of the plaintiff;

(b) Coercing, intimidating, ordering, instigating, inducing, encouraging or otherwise causing the employes of the Borough to absent themselves from work;

(c) In any manner impeding, obstructing, hampering the business of the Borough;

(d) Advising, encouraging or assisting in the doing of any of the things which are herein forbidden.

2. That the defendants cease and desist from engaging in a prohibited strike.

3. That the defendants comply with all the provisions of 43 P.S. §215.2.

4. That the Sheriff of ______________ County, with the assistance of the State Police, enforce full compliance with the Decree of this Court, using all the power vested in them under the law.

5. That the individual defendants, ____
____
____
communicate, or cause to be communicated prior to ________________ on the _________ day of ______________, 197____, to all members of the Union, by means reasonably calculated to insure receipt thereof, the fact that an Injunction Decree has been entered by this Court and the contents of said Decree.

6. That this Injunction continue in effect until further order of this Court and the motion for its continuance be heard by the Court on the _________ day of ____________________, 197____, at ____________________________, Pennsylvania at _____ o'clock in Court Room _________.

BY THE COURT:

____
J.

FORM NO. 18

Preliminary Injunction (sympathy picketing)

IN THE COURT OF COMMON PLEAS OF
______________________ COUNTY, PENNSYLVANIA

____________________________ SCHOOL DISTRICT,	
Plaintiff	
vs.	CIVIL ACTION — EQUITY
________________________ EDUCATION ASSOCIATION AND ________________ STATE EDUCATION ASSOCIATION unincorporated associations; and	NO. 19___
________________________________ ________________________________ ________________________________ ________________________________ ________________________________ ________________________________ ________________________________ ________________________________	
individually and as trustees ad litem; and all members of the ____________________ Education Association,	
Defendants	

PRELIMINARY INJUNCTION

AND NOW, this ________ day of ________________________, 197___, upon the verified complaint and upon consideration of affidavits and argument of counsel in support thereof it is hereby ORDERED ADJUDGED AND DECREED:

1. That a Preliminary Injunction be granted forthwith restraining and enjoining the defendants and each of them and any and all persons acting in concert with them from:

(a) In any manner continuing to refuse to cross picket line or to strike or to withhold services as employes of plaintiff;

(b) Coercing, intimidating, ordering, instigating, inducing, encouraging or otherwise causing the employes of the School District to refuse to cross said picket line or to absent themselves from work;

(c) In any manner impeding, obstructing, hampering or interferring with the business of the School District;

(d) Advising, encouraging or assisting in the doing of any of the things which are herein forbidden.

2. That the defendants cease and desist from engaging in a prohibited refusal to cross said picket line or strike.

3. That the defendants cease refusing to cross said picket line and to terminate the prohibited strike and direct all of the members of the ____.E.A. to return to work forthwith.

4. That the defendants comply with all the provisions of the Public Employe Relations Act and particularly Article X and XI thereof.

5. That the Sheriff of ____________________ County, with the assistance of the local police enforce full compliance with the Decree of this Court, using all the power vested in them under the law.

6. That the individual defendants, ____

____

____

communicate, or cause to be communicated prior to ________________ on the ________ day of ________, 197___, to all members of the Union, by means reasonably calculated to insure receipt thereof, the fact that an Injunction Decree has been entered by this Court and the contents of said Decree.

7. That this Injunction continue in effect until further order of this Court and the motion for its continuance be heard by the Court on the ________ day of ____________________, 197___, at __________________________, Pennsylvania at _____ o'clock in Court Room ________.

BY THE COURT:

____
J.

FORM NO. 19

Preliminary Injunction (mass picketing and lawlessness)

IN THE COURT OF COMMON PLEAS OF
__________________________ COUNTY, PENNSYLVANIA

______________________ SCHOOL DISTRICT,	:	
Plaintiff	:	
vs.	:	CIVIL ACTION – EQUITY
______________________ EDUCATION ASSOCIATION and ______________________ STATE EDUCATION ASSOCIATION, unincorpated associations; and	:	NO. __________ __________ TERM, 19____
______________________ ______________________ ______________________ ______________________ ______________________ ______________________ ______________________ ______________________ ______________________	:	
individually and as trustees ad litem; and any other persons acting in concert with them or otherwise participating in their aid,	:	
Defendants	:	

(CAPTION)

PRELIMINARY INJUNCTION

AND NOW, this __________ day of ____________________________, 197____, upon the verified complaint and upon consideration of affidavits, memorandum of law, and argument of counsel in support thereof it is hereby ORDERED, ADJUDGED AND DECREED:

1. That defendants, individually and collectively, and their agents, officers, representatives, servants, supervisors and employes and all other persons acting under, by, through or in concert with them or otherwise participating in their aid, are hereby ENJOINED, RESTRAINED AND PREVENTED, preliminarily until hearing from doing the following acts or any one of them anywhere in the Commonwealth of Pennsylvania:

(a) Preventing or attempting to prevent by mass picketing, violence, intimidation or coercion, or any threats thereof, any person or persons having lawful business upon plaintiff's premises from freely entering or leaving plaintiff's premises;

(b) Obstructing, hindering or attempting to obstruct or hinder, ingress or egress from plaintiff's premises by plaintiff's students, officers, agents, employes, representatives and others having business with plaintiff;

(c) Interfering with, hindering or obstructing by mass picketing, violence, intimidation or coercion, or any threats thereof, the operation of plaintiff's schools and offices and the transportation of plaintiff's students or supplies to and from the plaintiff's schools and offices in ______________________, Pennsylvania, or attempting to do so;

(d) Having in front of or in close proximity to the gates of plaintiff's premises at ____________________________, Pennsylvania, more than three (3) pickets at any one time, such pickets to be in motion at all times and spaced not less than ten feet apart in a single line and to conduct themselves in such manner as not to block or interfere in any way with the use of such entrances by person or persons desiring to enter or leave said premises on foot or by vehicle.

(e) Seizing or damaging any property of the plaintiff, its agents, officers, representatives, servants, supervisors, and employes or other persons doing business with the plaintiff; and

(f) Trespassing on the premises of the plaintiff.

2. That the sheriff of ____________________ County, be directed to enforce full compliance with the Decree of this Honorable Court, using all of the power vested in them under the law.

3. That the individual defendants communicate, or cause to be communicated forthwith, to all members of defendant Associations, by means reasonably calculated to insure receipt thereof, the fact that a Preliminary Injunction has been entered by this Court, effective immediately, and the contents of said Injunction.

4. That this Injunction continue in effect until further order of this Court and the motion for its continuance be heard by the Court on the __________ day of ________________________, 197____, at __________________________________, Pennsylvania at ______ o'clock in Court Room __________.

BY THE COURT:

____
J.

APPENDIX 2

Public Employee Relations Act

Following is the text of Act 195, act of July 23, 1970, as amended. This is set forth in Purdon's Statutes as 43 P.S. §1101. ______.

ARTICLE I

Public Policy

Section 101. The General Assembly of the Commonwealth of Pennsylvania declares that it is the public policy of this Commonwealth and the purpose of this act to promote orderly and constructive relationships between all public employers and their employees subject, however, to the paramount right of the citizens of this Commonwealth to keep inviolate the guarantees for their health, safety and welfare. Unresolved disputes between the public employer and its employees are injurious to the public, and the General Assembly is therefore aware that adequate means must be established for minimizing them and providing for their resolution. Within the limitations imposed upon the governmental processes by these rights of the public at large and recognizing that harmonious relationships are required between the public employer and its employees, the General Assembly has determined that the overall policy may best be accomplished by (1) granting to public employees the right to organize and choose freely their representatives; (2) requiring public employers to negotiate and bargain with employee organizations representing public employees and to enter into written agreements evidencing the result of such bargaining; and (3) establishing procedures to provide for the protection of the rights of the public employee, the public employer and the public at large.

ARTICLE II

Short Title

Section 201. This act shall be known and may be cited as the "Public Employee Relations Act."

ARTICLE III

Definitions

Section 301. As used in this act:

(1) "Public employer" means the Commonwealth of Pennsylvania, its political subdivisions, including school districts, and any officer, board, commission, agency, authority, or other instrumentality thereof, and any nonprofit organization or institution, and any charitable, religious, scientific, literary, recreational, health, educational or welfare institution receiving grants or appropriations from local, state or federal governments, but shall not include employers covered or presently subject to coverage under the act of June 1, 1937 (P.L.1168), as amended, known as the "Pennsylvania Labor Relations Act," the act of July 5, 1935, Public Law 198, 74th Congress, as amended, known as the "National Labor Relations Act."

(2) "Public employee" or "employee" means any individual employed by a public employer, but shall not include elected officials, appointees of the Governor with the advice and consent of the Senate, as required by law, management level employees, confidential employees, clergymen or other persons in a religious profession, employees or personnel at church offices or facilities when utilized primarily for religious purposes, and those employees covered under the act of June 24, 1968 (Act No. 111), entitled "An act specifically authorizing collective bargaining between policemen and firemen and their police employers; providing for arbitration in order to settle disputes, and requiring compliance with collective bargaining agreements and findings of arbitrators."

(3) "Employee organization" means an organization of any kind, or any agency or employee representation committee or plan in which membership includes public employees, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, employee-employer disputes, wages, rates of pay,

hours of employment, or conditions of work, but shall not include any organization which practices discrimination in membership because of race, color, creed, national origin or political affiliation.

(4) "Representative" means any individuals acting for public employers or employees and shall include employee organizations.

(5) "Board" means the Pennsylvania Labor Relations Board.

(6) "Supervisor" means any individual having authority in the interests of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibility to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment.

(7) "Professional employee" means any employee whose work: (i) is predominantly intellectual and varied in character; (ii) requires consistent exercise of discretion and judgment; (iii) requires knowledge of an advanced nature in the field of science or learning customarily acquired by specialized study in an institution of higher learning or its equivalent; and (iv) is of such character that the output or result accomplished cannot be standardized in relation to a given period of time.

(8) "Unfair practice" means any practice prohibited by Article XII of this act.

(9) "Strike" means concerted action in failing to report for duty, the wilful absence from one's position, the stoppage of work, slowdown, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment for the purpose of inducing, influencing or coercing a change in the conditions or compensation or the rights, privileges, or obligations of employment.

(10) "Person" includes an individual, public employer, public employee, authority, commission, legal representative, labor organization, employee organization, profit or nonprofit corporation, trustee, board or association.

(11) "Membership dues deduction" means the practice of a public employer to deduct from the wages of a public employee, with his written consent, an amount for the payment of his membership dues in an employee organization, which deduction is transmitted by the public employer to the employee organization.

(12) "Budget submission date" means the date by which under the law or practice a public employer's proposed budget, or budget containing proposed expenditures applicable to such public employer is submitted to the Legislature or other similar body for final action. For the purposes of this act, the budget submission date for the Commonwealth shall be February 1 of each year and for a nonprofit organization or institution, the last day of its fiscal year.

(13) "Confidential employee" shall mean any employee who works: (i) in the personnel offices of a public employer and has access to information subject to use by the public employer in collective bargaining; or (ii) in a close continuing relationship with public officers or representatives associated with collective bargaining on behalf of the employer.

(14) "Wages" means hourly rates of pay, salaries or other forms of compensation for services rendered.

(15) "Commonwealth employee" means a public employee employed by the Commonwealth or any board, commission, agency, authority, or any other instrumentality thereof.

(16) "Management level employee" means any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall in-

clude all employees above the first level of supervision.

(17) "Meet and discuss" means the obligation of a public employer upon request to meet at reasonable times and discuss recommendations submitted by representatives of public employees: Provided, That any decisions or determinations on matters so discussed shall remain with the public employer and be deemed final on any issue or issues raised.

(18) "Maintenance of membership" means that all employees who have joined an employee organization or who join the employee organization in the future must remain members for the duration of a collective bargaining agreement so providing with the proviso that any such employee or employees may resign from such employee organization during a period of fifteen days prior to the expiration of any such agreement.

(19) "First level of supervision" and "first level supervisor" means the lowest level at which an employee functions as a supervisor.

ARTICLE IV

Employe Rights

Section 401. It shall be lawful for public employees to organize, form, join or assist in employee organizations or to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice and such employees shall also have the right to refrain from any or all such activities, except as may be required pursuant to a maintenance of membership provision in a collective bargaining agreement.

ARTICLE V

Pennsylvania Labor Relations Board

Section 501. The board shall exercise those powers and perform those duties which are specifically provided for in this act. These powers and duties shall be in addition to and exercised completely independent of any powers and duties specifically granted to it by other statutory enactments.

Section 502. The board shall have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this act. Such rules and regulations shall be effective upon publication in the manner which the board shall prescribe.

Section 503. The board shall establish after consulting representatives of employee organizations and of public employers, panels of qualified persons broadly representative of the public to be available to serve as members of fact-finding boards.

ARTICLE VI

Representation

Section 601. Public employers may select representatives to act in their interest in any collective bargaining with representatives of public employees.

Section 602. (a) A public employer may recognize employee representatives for collective bargaining purposes, provided the parties jointly request certification by the board which shall issue such certification if it finds the unit appropriate.

(b) Any employee representatives in existence on January 1, 1970, shall so continue without the requirement of an election and certification until such time as a question concerning representation is appropriately raised under this act; or until the board would find the unit not to be appropriate after challenge by the public employer, a member of the unit or an employee organization. The appropriateness of the unit shall not be challenged until the expiration of any collective bargaining agreement in effect on the date of the passage of this act.

Section 603. (a) A public employee, a group of public employees or an employee organization may notify the public employer that thirty per cent or more of the public employees in an appropriate unit desire to be exclusively represented for collective bargaining purposes by a designated representative and request the public employer to consent to an election.

(b) If the public employer consents, the public employee, group of public employees or employee organization whichever applicable may submit in a form and manner established by the board an election request. Such request shall include a description of the unit deemed to be appropriate, the basis upon which it was determined that thirty percent or more of the employees desired to be represented and a joinder by the public employer. The board may on the basis of the submissions order an election to be held or it may at its discretion investigate or conduct hearings to determine the validity of the matters contained in such submissions before determining whether or not an order should issue.

(c) If a public employer refuses to consent to an election, the party making the request may file a petition with the board alleging that thirty per cent or more of the public employees in an appropriate unit wish to be exclusively represented for collective bargaining purposes by a designated representative. The board shall send a copy of the petition to the public employer and provide for an appropriate hearing upon due notice. If it deems the allegations in the petition to be valid and the unit to be appropriate it shall order an election. If it finds to the contrary it may dismiss the petition or permit its amendment in accordance with procedures established by the board.

(d) If a public employer receives notification that thirty per cent or more of the public employees desire to be exclusively represented for collective bargaining purposes by a designated representative and the party giving notice does not thereafter seek an election the public employer may file a petition for the same with the board. The board shall then follow the procedures as established for petitions filed under subsection (c) of this section.

Section 604. The board shall determine the appropriateness of a unit which shall be the public employer unit or a subdivision thereof. In determining the appropriateness of the unit, the board shall:

(1) Take into consideration but shall not be limited to the following: (i) public employees must have an identifiable community of interest, and (ii) the effects of over-fragmentization.

(2) Not decide that any unit is appropriate if such unit includes both professional and nonprofessional employees, unless a majority of such professional employees vote for inclusion in such unit.

(3) Not permit guards at prisons and mental hospitals, employees directly involved with and necessary to the functioning of the courts of this Commonwealth, or any individual employed as a guard to enforce against employees and other persons, rules to protect property of the employer or to protect the safety of persons on the employer's premises to be included in any unit with other public employees, each may form separate homogenous employee organizations with the proviso that organizations of the latter designated employee group may not be affiliated with any other organization representing or including as members, persons outside of the organization's classification.

(4) Take into consideration that when the Commonwealth is the employer, it will be bargaining on a Statewide basis unless issues involve working conditions peculiar to a given governmental employment locale. This section, however, shall not be deemed to prohibit multi-unit bargaining.

(5) Not permit employees at the first level of supervision to be included with any other units of public employees but shall permit them to form their own separate homogenous units. In determining supervisory status the board may take into consideration the extent to which supervisory and nonsupervisory functions are performed.

Section 605. Representation elections shall be conducted by secret ballot at such times and places selected by the board subject to the following:

(1) The board shall give no less than ten days notice of the time and place of such election.

(2) The board shall establish rules and regulations concerning the conduct of any election including but not limited to regulations which would guarantee the secrecy of the ballot.

(3) A representative may not be certified unless it receives a majority of the valid ballots cast.

(4) The board shall include on the ballot a choice of "no representative."

(5) In an election where none of the choices on the ballot receives a majority, a run-off election shall be conducted, the ballot providing for a selection between the two choices or parties receiving the highest and the second highest number of ballots cast in the election.

(6) The board shall certify the results of said election within five working days after the final tally of votes it no charge is filed by any person alleging that an "unfair practice" existed in connection with said election. If the board has reason to believe that such allegations are valid, it shall set a time for hearing on the matter after due notice. Any such hearing shall be conducted within two weeks of the date of receipt of such charge. If the board determines that the outcome of the election was affected by the "unfair practice" charged or for any other "unfair practice" it may deem existed, it shall require corrective action and order a new election. If the board determines that no unfair practice existed or if it existed, did not affect the outcome of the election, it shall immediately certify the election results.

(7) (i) No election shall be conducted pursuant to this section in any appropriate bargaining unit within which in the preceding twelve-month period an election shall have been held nor during the term of any lawful collective bargaining agreement between a public employer and an employee representative. This restriction shall not apply to that period of time covered by any collective bargaining agreement which exceeds three years. For the purposes of this section, extensions of agreements shall not affect the expiration date of the original agreement.

(ii) Petitions for elections may be filed with the board not sooner than ninety days nor later than sixty days before the expiration date of any collective bargaining agreement or after the expiration date until such time as a new written agreement has been entered into. For the purposes of this section, extensions of agreements shall not affect the expiration date of the original agreement.

Section 606. Representatives selected by public employees in a unit appropriate for collective bragaining purposes shall be the exclusive representative of all the employees in such unit to bargain on wages, hours, terms and conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have them adjusted without the intervention of the bargaining representative as long as the adjustment is not inconsistent with the terms of a collective bargaining contract then in effect: And, provided further, That the bargaining representative has been given an opportunity to be present at such adjustment.

Section 607. If there is a duly certified representative: (i) a public employee or a group of public employees may file a petition for decertification provided it is supported by a thirty per cent showing of interest, or (ii) a public employer alleging a good faith doubt of the majority status of said representative may file a petition in accordance with the rules and regulations established by the board, subject to the provisions of clause (7) of section 605.

ARTICLE VII

Scope of Bargaining

Section 701. Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Section 702. Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employee representatives.

Section 703. The parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of the Commonwealth of Pennsylvania or the provisions of municipal home rule charters.

Section 704. Public employers shall not be required to bargain with units of first level supervisors or their representatives but shall be required to meet and discuss with first level supervisors or their representatives, on matters deemed to be bargainable for other public employees covered by this act.

Section 705. Membership dues deductions and maintenance of membership are proper subjects of bargaining with the proviso that as to the latter, the payment of dues and assessments while members, may be the only requisite employment condition.

Section 706. Nothing contained in this act shall impair the employer's right to hire employees or to discharge employees for just cause consistent with existing legislation.

ARTICLE VIII

Collective Bargaining Impasse

Section 801. If after a reasonable period of negotiation, a dispute impasse exists between the representatives of the public employer and the public employees, the parties may voluntarily submit to mediation but if no agreement is reached between the parties within twenty-one days after negotiations have commenced, but in no event later than one hundred fifty days prior to the "budget submission date," and mediation has not been utilized by the parties, both parties shall immediately, in writing, call in the service of the Pennsylvania Bureau of Mediation.

Section 802. Once mediation has commenced, it shall continue for so long as the parties have not reached an agreement. If, however, an agreement has not been reached within twenty days after mediation has commenced or in no event later than one hundred thirty days prior to the "budget submission date," the Bureau of Mediation shall notify the board of this fact. Upon receiving such notice the board may in its discretion appoint a fact-finding panel which panel may consist of either one or three members. If a panel is so designated or selected it shall hold hearings and take oral or written testimony and shall have subpoena power. If during this time the parties have not reached an agreement, the panel shall make findings of fact and recommendations:

(1) The findings of fact and recommendations shall be sent by registered mail to the board and to both

parties not more than forty days after the Bureau of Mediation has notified the board as provided in the preceding paragraph.

(2) Not more than ten days after the findings and recommendations shall have been sent, the parties shall notify the board and each other whether or not they accept the recommendations of the fact-finding panel and if they do not, the panel shall publicize its findings of fact and recommendations.

(3) Not less than five days nor more than ten days after the publication of the findings of fact and recommendations, the parties shall again inform the board and each other whether or not they will accept the recommendations of the fact-finding panel.

(4) The Commonwealth shall pay one-half the cost of the fact-finding panel; the remaining one-half of the cost shall be divided equally between the parties. The board shall establish rules and regulations under which panels shall operate, including, but not limited to, compensation for panel members.

Section 803. If the representatives of either or both the public employees and the public employer refuse to submit to the procedures set forth in sections 801 and 802 of this article, such refusal shall be deemed a refusal to bargain in good faith and unfair practice charges may be filed by the submitting party or the board may on its own, issue an unfair practice complaint and conduct such hearings and issue such orders as provided for in Article XIII.

Section 804. Nothing in this article shall prevent the parties from submitting impasses to voluntary binding arbitration with the proviso the decisions of the arbitrator which would require legislative enactment to be effective shall be considered advisory only.

Section 805. Notwithstanding any other provisions of this act where representatives of units of guards at prisons or mental hospitals or units of employes directly involved with and necessary to the functioning of the courts of this Commonwealth have reached an impasse in collective bargaining and mediation as required in section 801 of this article has not resolved the dispute, the impasse shall be submitted to a panel of arbitrators whose decision shall be final and binding upon both parties with the proviso that the decisions of the arbitrators which would require legislative enactment to be effective shall be considered advisory only.

Section 806. Panels of arbitrators for bargaining units referred to in section 805 of this article shall be selected in the following manner:

(1) Each party shall select one member of the panel, the two so selected shall choose the third member.

(2) If the members so selected are unable to agree upon the third member within ten days from the date of their selection, the board shall submit the names of seven persons, each party shall alternately strike one name until one shall remain. The public employer shall strike the first name. The person so remaining shall be the third member and chairman.

Section 807. Whenever a panel of arbitrators is hereafter constituted pursuant to the provisions of Sec. 806 of the act of July 23, 1970 (P. L. 563, No. 195), known as the "Public Employee Relations Act," the cost of the arbitrator selected by each party shall be paid by the respective party selecting the arbitrator. The cost of the impartial arbitrator selected by the arbitrators already selected or selected in accordance with the procedure set forth in Sec. 806(2) of the act of July 23, 1970 (P. L. 563, No. 195), known as the "Public Employee Relations Act," shall be paid by the Pennsylvania Labor Relations Board. (As amended by Act 67, L. 1976, effective May 20, 1976)

ARTICLE IX

Collective Bargaining Agreement

Section 901. Once an agreement is reached between the representatives of the public employees and the public employer, the agreement shall be reduced to writing and signed by the parties. Any provisions of the contract requiring legislative action will only be effective if such legislation is enacted.

Section 902. If the provisions of the constitution or bylaws of an employee organization requires ratification of a collective bargaining agreement by its membership, only those members who belong to the bargaining unit involved shall be entitled to vote on such ratification notwithstanding such provisions.

Section 903. Arbitration of disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory. The procedure to be adopted is a proper subject of bargaining with the proviso that the final step shall provide for a binding decision by an arbitrator or a tripartite board of arbitrators as the parties may agree. Any decisions of the arbitrator or arbitrators requiring legislation will only be effective if such legislation is enacted:

(1) If the parties cannot voluntarily agree upon the selection of an arbitrator, the parties shall notify the Bureau of Mediation of their inability to do so. The Bureau of Mediation shall then submit to the parties the names of seven arbitrators. Each party shall alternately strike a name until one name remains. The public employer shall strike the first name. The person remaining shall be the arbitrator.

(2) The costs of arbitration shall be shared equally by the parties. Fees paid to arbitrators shall be based on a schedule established by the Bureau of Mediation.

Section 904. Any provision of any collective bargaining agreement in existence on January 1, 1970 which is inconsistent with any provision of this act but not otherwise illegal shall continue valid until the expiration of such contract. The parties to such agreements may continue voluntarily to bargain on any such items after the expiration date of any such agreement and for so long as these items remain in any future agreement.

ARTICLE X

Strikes

Section 1001. Strikes by guards at prisons or mental hospitals, OR employes directly involved with and necessary to the functioning of the courts of this Commonwealth are prohibited at any time. If a strike occurs the public employer shall forthwith initiate in the court of common pleas of the jurisdiction where the strike occurs, an action for appropriate equitable relief including but not limited to injunctions. If the strike involves Commonwealth employes, the chief legal officer of the public employer or the Attorney General where required by law shall institute an action for equitable relief either in the court of common pleas of the jurisdiction where the strike has occurred or the Commonwealth Court.

Section 1002. Strikes by public employees during the pendency of collective bargaining procedures set forth in sections 801 and 802 of Article VIII are prohibited. In the event of a strike during this period the public employer shall forthwith initiate an action for the same relief and utilizing the same procedures required for prohibited strikes under section 1001.

Section 1003. If a strike by public employees occurs after the collective bargaining processes set forth in sections 801 and 802 of Article VIII of this act have been completely utilized and exhusted, it shall not be prohibited unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public. In such cases the public employer shall initiate, in the court of common pleas of the jurisdiction where such strike occurs, an action for equitable relief including but not limited to appropriate injunctions and shall be entitled to such relief if the court finds that the strike creates a clear and present danger or threat to the health, safety or welfare of the public. If the strike involves Commonwealth employes, the chief legal officer of the public employer or the Attorney

General where required by law shall institute an action for equitable relief in the court of common pleas of the jurisdiction where the strike has occurred or the Commonwealth Court. Prior to the filing of any complaint in equity under the provisions of this section the moving party shall serve upon the defendant a copy of said complaint as provided for in the Pennsylvania Rules of Civil Procedure applicable to such actions. Hearings shall be required before relief is granted under this section and notices of the same shall be served in the manner required for the original process with a duty imposed upon the court to hold such hearings forthwith.

Section 1004. An unfair practice by a public employer shall not be a defense to a prohibited strike. Unfair practices by the employer during the collective bargaining processes shall receive priority by the board as set forth in Article XIV.

Section 1005. If a public employee refuses to comply with a lawful order of a court of competent jurisdiction issued for a violation of any of the provisions of this article the public employer shall initiate an action for contempt and if the public employee is adjudged guilty of such contempt, he shall be subject to suspension, demotion or discharge at the discretion of the public employer, provided the public employer has not exercised that discretion in violation of clauses (1), (2), (3) and (4) of subsection (a) of section 1201, Article XII.

Section 1006. No public employee shall be entitled to pay or compensation from the public employer for the period engaged in any strike.

Section 1007. In the event any public employee refuses to obey an order issued by a court of competent jurisdiction for a violation of the provisions of this article, the punishment for such contempt may be by fine or by imprisonment in the prison of the county where the court is sitting or both in the discretion of the court.

Section 1008. Where an employee organization wilfully disobeys a lawful order of a court of competent jurisdiction issued for a violation of the provisions of this article, the punishment for each day that such contempt persists may be by a fine fixed in the discretion of the court.

Section 1009. In fixing the amount of the fine or imprisonment for contempt, the court shall consider all the facts and circumstances directly related to the contempt including but not limited to (i) any unfair practices committed by the public employer during the collective bargaining processes; (ii) the extent of the wilful defiance or resistance to the court's order; (iii) the impact of the strike on the health, safety or welfare of the public, and (iv) the ability of the employee organization or the employee to pay the fine imposed.

Section 1010. Nothing in this article shall prevent the parties from voluntarily requesting the court for a diminution or suspension of any fines or penalties imposed. Any requests by employee representatives for such participation by the public employer shall be subject to the requirements of "meet and discuss."

ARTICLE XI

Picketing

Section 1101. Public employees, other than those engaged in a nonprohibited strike, who refuse to cross a picket line shall be deemed to be engaged in a prohibited strike and shall be subject to the terms and conditions of Article X pertaining to prohibited strikes.

ARTICLE XII

Unfair Practices

Section 1201. (a) Public employers, their agents or representatives are prohibited from:

(1) Interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of this act.

(2) Dominating or interfering with the formation, existence or administration of any employee organization.

(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization.

(4) Discharging or otherwise discriminating against an employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act.

(5) Refusing to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

(6) Refusing to reduce a collective bargaining agreement to writing and sign such agreement.

(7) Violating any of the rules and regulations established by the board regulating the conduct of representation elections.

(8) Refusing to comply with the provisions of an arbitration award deemed binding under section 903 of Article IX.

(9) Refusing to comply with the requirements of "meet and discuss."

(b) Employee organizations, their agents, or representatives, or public employees are prohibited from:

(1) Restraining or coercing employees in the exercise of the rights guaranteed in Article IV of this act.

(2) Restraining or coercing a public employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances.

(3) Refusing to bargain collectively in good faith with a public employer, if they have been designated in accordance with the provisions of this act as the exclusive representative of employees in an appropriate unit.

(4) Violating any of the rules and regulations established by the board regulating the conduct of representation elections.

(5) Refusing to reduce a collective bargaining agreement to writing and sign such agreement.

(6) Calling, instituting, maintaining or conducting a strike or boycott against any public employer or picketing any place of business of a public employer on account of any jurisdictional controversy.

(7) Engaging in, or inducing or encouraging any individual employed by any person to engage in a strike or refusal to handle goods or perform services; or threatening, coercing or restraining any person where an object thereof is to (i) force or require any public employer to cease dealing or doing business with any other person or (ii) force or require a public employer to recognize for representation purposes an employee organization not certified by the board.

(8) Refusing to comply with the provisions of an arbitration award deemed binding under section 903 of Article IX.

(9) Refusing to comply with the requirements of "meet and discuss."

ARTICLE XIII

Prevention of Unfair Practices

Section 1301. The board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair practice listed in Article XII of this act. This power shall be exclusive and shall not be affected by any other means of adjustment or prevention that have been or may be established by agreement, law, or otherwise.

Section 1302. Whenever it is charged by any interested party that any person has engaged in or is engaging in any such unfair practice, the board, or any member or designated agent thereof, shall have authority to issue and cause to be served upon such person a complaint, stating the charges in that respect, and containing a notice of hearing before the board, or any member or designated agent thereof, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the board, member or agent conducting the hearing at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person, or otherwise, to give testimony at the place and time set in the complaint. In the discretion of a member or agent conducting the hearing or of the board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding, the rules of evidence prevailing in courts of law or equity shall be followed but shall not be controlling.

Section 1303. Testimony shall be taken at the hearing and filed with the board. The board upon notice may take further testimony or hear argument. If, upon all the testimony taken, the board shall determine that any person named in the complaint has engaged in or is engaging in any such unfair practice, the board shall state its findings of fact, and issue and cause to be served on such person an order requiring such person to cease and desist from such unfair practice, and to take such reasonable affirmative action, including reinstatement of employees, discharged in violation of Article XII of this act, with or without back pay, as will effectuate the policies of this act. Such order may further require such person to make reasonable reports, from time to time, showing the extent to which the order has been complied with. If, upon all the testimony, the board shall be of the opinion that the person or persons named in the complaint has not engaged in or is not engaging in any such unfair practice, then the board shall make its findings of fact and shall issue an order dismissing the complaint. A copy of such findings of fact, conclusions of law, and order shall be mailed to all parties to the proceedings.

Section 1304. Until a transcript of the record in a case shall have been filed in a court as hereinafter provided, the board may at any time, upon reasonable notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it: Provided, That any agreement made between an employer and a bona fide employee organization, and all the provisions thereof, shall be entitled to full force and effect unless the board specifically finds that these provisions involve the commission of an unfair practice within the meaning of Article XII of this act.

Section 1305. The proceedings before the board or before any of its examiners shall be conducted with speed and dispatch. No findings shall be made on the basis of evidence relating to acts which occurred prior to the original passage of this act.

Section 1306. All cases in which complaints are actually issued by the board, shall be prosecuted before the board or its examiner, or both, by the representatives of the employe organization or party filing the charge, and, in addition thereto or in lieu thereof if the Department of Justice sees fit, by a deptuy attorney general especially assigned to this type of case. No examiner shall have any other position with the government of this State or of the United States or with the Pennsylvania Labor Relations Board while in the employ of the board.

ARTICLE XIV

Unfair Practices During Article VIII Procedures

Section 1401. Notwithstanding any of the provisions of Article XIII, the board upon the filing of a charge alleging the commission of an unfair labor practice committed during, or arising out of the collective bargaining procedures set forth in sections 801 and 802 of Article VIII of this act, shall be empowered to petition the court of competent jurisdiction for appropriate relief or restraining order.

Upon the filing of any such petition the board shall cause notice thereof to be served upon such person and thereupon the court shall have jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper.

ARTICLE XV

Judicial Review

Section 1501. The board shall except where an employee of the Commonwealth is involved have power to petition the court of common pleas of any county wherein the unfair practice in question occurred, or wherein any person charged with the commission of any unfair practice resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the board. In the instance of the exception involving the said Commonwealth employees, the board shall file its petition in the Commonwealth Court. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief, restraining or mandamus order as it deems just and proper or requisite to effectuate the policies of this act and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying and enforcing as so modified, or setting aside, in whole or in part, the order of the board. The parties before the court shall be the board, the person charged with the commission of any unfair labor practice, and may include the charging party. No objection that has not been urged before the board, its members or agents shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the board as to the facts, if supported by substantial and legally credible evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court, that such additional evidence is material, and that there were reasonable grounds for the failure to adduce such evidence at the hearing before the board, its members or agent, the court may order such additional evidence to be taken before the board, its members or agent, and to be made a part of the transcript. The board may modify its findings as to the facts or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings which, if supported by substantial and legally credible evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court of common pleas, or the Commonwealth Court, as the case may be, shall be exclusive within the limits of its jurisdiction, and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court on appeal by the board or any party in interest, irrespective of the nature of the decree or judgment or the amount involved. Such appeal shall be taken within a period of thirty days from the date of court's order and otherwise prosecuted in the same manner and from and with the same effect as is provided in other cases of appeal to the Supreme Court, and the record so certified shall contain all that was before the court of common pleas or the Commonwealth Court, as the case may be.

Section 1502. Any person aggrieved by a final order of the board granting or denying, in whole or in part, the relief sought in any unfair practice case, or by an order certifying or refusing to certify a collective bargaining agent of employees in any representation case, may obtain a review of such order in the court of common pleas of any county where the unfair practice in question was alleged to have been engaged in, or wherein such person or employer in a representation case resides or transacts business, or in the instance of Commonwealth employees in the Commonwealth Court, as the case may be, by filing in such court, within thirty days after the final order has been issued by the board, a written petition praying that the order of the board be modified or set aside. A copy of such petition shall be forthwith served upon the board, and the board shall file in the court a transcript of the entire record in the proceeding certified by the board, including the pleadings and testimony and order of the board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the board under section 1501, and shall have the same exclusive jurisdiction to grant to the board such temporary relief, restraining or mandamus order as it deems just and proper or requisite to effectuate the policies of this act, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside, in whole or in part, the order of the board, and findings of the board as to the facts, if supported by substantial and legally credible evidence, shall in like manner be conclusive. The parties before the court shall be any person aggrieved by an order of the board, as aforesaid, and the board and any other party to the board proceeding. The jurisdiction of the court of common pleas, or the Commonwealth Court, as the case may be, shall be exclusive within the limits of its jurisdiction, and its judgment and decree shall be final, except that the same shall be subject to review of the Supreme Court on appeal by the person aggrieved, or the board, irrespective of the nature of the decree or judgment or the amount involved. Such appeal shall be taken within thirty days of the date of the court's order and otherwise prosecuted in the same manner and form, and with same effect, as is provided in other cases of appeal to the Supreme Court, and the record so certified shall contain all that was before the court of common pleas or the Commonwealth Court, as the case may be.

Section 1503. The commencement of proceedings under sections 1501 or 1502 of this article shall not, unless specifically ordered by the court, operate as a stay of the board's order.

Section 1504. When granting appropriate temporary relief, a restraining or mandamus order or making and entering a decree enforcing, modifying, or enforcing as so modified, or setting aside, in whole or in part, an order of the board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by acts pertaining to equity jurisdiction of courts. The act of June 2, 1937 (P.L. 1198), known as the "Labor Anti-Injunction Act," shall not be applicable to orders of the board, or to court orders enforcing orders of the board, or any provision of this act, or to violations of any order of the board, or of court orders enforcing orders of the board, or any provisions of this act.

Section 1505. Petitions filed under this act shall be heard expeditiously and, if possible, within ten days after they have been docketed. No petitions or charges involving questions arising under clause (2) of subsection (a) of section 1201 of Article XII shall relieve the board of determining any questions arising under sections 603, 604 and 605 of Article VI immediately, and in their regular and normal order, and the making of a certification thereon if such is warranted. No petition or charge shall be entertained which relates to acts which occurred or statements which were made more than four months prior to the filing of the petition or charge.

ARTICLE XVI

Investigatory Powers

Section 1601. For the purpose of all hearings and investigations which, in the opinion of the board, are necessary and proper for the exercise of the powers vested in it by Article VI and Article XIII, and for the purpose of investigating and considering disputes, other than a question concerning the representation of employees, which it shall be the duty of the board to undertake whenever petitioned so to do by either an employee organization, an employer, or the representative of any unit of employees, the board shall have the investigatory powers granted in this article.

Section 1602. The board or its duly authorized agents shall at all reasonable times have access to, for the purpose of examination and the right to copy, any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the board shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the board, its members or agent conducting the hearing or investigation. Such subpoenas shall be issued as a matter of right upon the request of either party at any time during the pendency of a proceeding. Any member of the board, or any agent designated by the board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence.

Section 1603. If any witness resides outside of the Commonwealth or through illness or other cause is unable to testify before the board or its members or agent conducting the hearing or investigation, his or her testimony or deposition may be taken within or without this Commonwealth, in such manner and in such forms as the board or its members or agent conducting the hearing, may by special or general rule prescribe.

Section 1604. In case of contumacy or refusal to obey a subpoena issued to any person except to any person representing the Commonwealth as an employer, when jurisdiction will be in the Commonwealth Court, the court of common pleas of any county within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the board, shall have jurisdiction to issue to such person an order requiring such person to appear before the board, its members or agent, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question, and any failure to obey such order of the courts may be punished by said court as a contempt thereof.

Section 1605. No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the board on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, but no individual shall be prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Section 1606. Complaints, orders and other process and papers of the board, its members or agent may be served, either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same, setting forth the manner of such service, shall be proof of the same and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid, shall be proof of service of the same. Witnesses summoned before the board, its members or agent shall be paid the same fees and mileage that are paid witnesses in the courts of this Commonwealth, and witnesses whose depositions are taken and the person taking the same shall severally be entitled to the same fees as are paid for like services in the courts of this Commonwealth.

Section 1607. All process of any court to which application may be made under this act may be served in the county wherein the defendant or other person required to be served resides or may be found.

ARTICLE XVII

Employee Organizations

Section 1701. No employee organization shall make any contribution out of the funds of the employee organization either directly or indirectly to any political party or organization or in support of any political candidate for public office.

The board shall establish such rules and regulations as it may find necessary to prevent the circumvention or evasion of the provisions of this section.

If an employee organization has made contributions in violation of this section it shall file with the board a report or affidavit evidencing such contributions within ninety days of the end of its fiscal year. Such report or affidavit shall be signed by its president and treasurer or corresponding principals.

Any employee organization which violates the provisions of this section or fails to file any required report or affidavit or files a false report or affidavit shall be subject to a fine of not more than two thousand dollars ($2,000).

Any person who wilfully violates this section, or who makes a false statement knowing it to be false, or who knowingly fails to disclose a material fact shall be fined not more than one thousand dollars ($1,000) or imprisoned for not more than thirty days or both. Each individual required to sign affidavits or reports under this section shall be personally responsible for filing such report or affidavit and for any statement contained therein he knows to be false.

Nothing herein shall be deemed to prohibit voluntary contributions by individuals to political parties or candidates.

ARTICLE XVIII

Conflict of Interest

Section 1801. (a) No person who is a member of the same local, State, national or international organization as the employee organization with which the public employer is bargaining or who has an interest in the outcome of such bargaining which interest is in conflict with the interest of the public employer, shall participate on behalf of the public employer in the collective bargaining processes with the proviso that such person may, where entitled, vote on the ratification of an agreement.

(b) Any person who violates subsection (a) of this section shall be immediately removed by the public employer from his role, if any, in the collective bargaining negotiations or in any matter in connection with such negotiations.

ARTICLE XIX

Penalties

Section 1901. Any person who shall wilfully resist, prevent, impede or interfere with any member of the board, or any of its agents, in the performance of duties pursuant to this act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not more than five thousand dollars ($5,000), or by imprisonment for not more than one year, or both.

ARTICLE XX

Savings Provisions

Section 2001. The rights granted to certain public employees by the following acts or parts thereof shall not be repealed or diminished by this act:

(1) Section 24 of the act of August 14, 1963 (P.L. 984), known as the "Metropolitan Transportation Authorities Act of 1963."

(2) The act of November 27, 1967 (P.L. 628), entitled "An act protecting the rights of employees of existing transportation systems, which are acquired by cities of the third class or any authority thereof or certain joint authorities; requiring cities of the third class or any authority

thereof or any such joint authority to enter into contracts with labor organizations acting for such employees, and providing for arbitration in case of disputes."

(3) Section 13.2 of the act of April 6, 1956 (P.L. 1414), known as the "Second Class County Port Authority Act."

Section 2002. This act shall not be construed to repeal the act of June 24, 1968 (Act No. 111), entitled "An act specifically authorizing collective bargaining between policemen and firemen and their public employers; providing for arbitration in order to settle disputes, and requiring compliance with collective bargaining agreements and findings of arbitrators."

Section 2003. Present provisions of an ordinance of the City of Philadelphia approved April 4, 1961, entitled "An Ordinance to authorize the Mayor to enter into an agreement with District Council 33, American Federation of State, County and Municipal Employees, A.F.L.-C.I.O., Philadelphia and vicinity regarding its representation of certain City Employees," which are inconsistent with the provisions of this act shall remain in full force and effect so long as the present provisions of that ordinance are valid and operative.

ARTICLE XXI

Separability

Section 2101. If any clause, sentence, paragraph or part of this act, or the application thereof to any person or circumstances, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this act and the application of such provision to other persons or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved. It is hereby declared to be the legislative intent that this act would have been adopted had such invalid provisions not been included.

ARTICLE XXII

Repeals

Section 2201. The act of June 30, 1947 (P.L. 1183), entitled "An act relating to strikes by public employees; prohibiting such strikes; providing that such employees by striking terminate their employment; providing for reinstatement under certain conditions; providing for a grievance procedure; and providing for hearings before civil service and tenure authorities, and in certain cases before the Pennsylvania Labor Relations Board," is hereby repealed as to those public employees covered by the provisions of this act, and any penalties or other limitations currently in force or presently pending against any public employees, shall be deemed null and void.

ARTICLE XXIII

Effective Date

Section 2301. This act shall take effect in ninety days, except that the provisions of Article V and the amnesty provisions of the repealer shall take effect immediately.

APPENDIX 3

Firemen and Policemen: Right to Bargain Collectively

Following is the text of Act 111, act of June 24, 1968, as amended. This is set forth in Purdon's Statutes as 43 P.S. §217.______.

Sec. 1.—Policemen or firemen employed by a political subdivision of the Commonwealth or by the Commonwealth shall, through labor organizations or other representatives designated by fifty per cent or more of such policemen or firemen, have the right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits, and shall have the right to an adjustment or settlement of their grievances or disputes in accordance with the terms of this act.

Sec. 2.—It shall be the duty of public employers and their policemen and firemen employes to exert reasonable effort to settle all disputes by engaging in collective bargaining in good faith and by entering into settlements by way of written agreements and maintaining the same.

Sec. 3.—Collective bargaining shall begin at least six months before the start of the fiscal year of the political subdivision or of the Commonwealth, as the case may be, and any request for arbitration, as hereinafter provided, shall be made at least one hundred ten days before the start of said fiscal year.

Sec. 4.—(a) If in any case of a dispute between a public employer and its policemen or firemen employes the collective bargaining process reaches an impasse and stalemate, or if the appropriate lawmaking body does not approve the agreement reached by collective bargaining, with the result that said employers and employes are unable to effect a settlement, then either party to the dispute, after written notice to the other party containing specifications of the issue or issues in dispute, may request the appointment of a board of arbitration.

For purposes of this section, an impasse or stalemate shall be deemed to occur in the collective bargaining process if the parties do not reach a settlement of the issue or issues in dispute by way of written agreement within thirty days after collective bargaining proceedings have been initiated.

In the case of disputes involving political subdivisions of the Commonwealth, the agreement shall be deemed not approved within the meaning of this section if it is not approved by the appropriate lawmaking body within one month after the agreement is reached by way of collective bargaining.

In the case of disputes involving the Commonwealth, the agreement shall be deemed not approved within this meaning of this section if it is not approved by the legislature within six months after the agreement is reached by way of collective bargaining.

(b) The board of arbitration shall be composed of three persons, one appointed by the public employer, one appointed by the body of policemen or firemen involved, and a third member to be agreed upon by the public employer and such policemen or firemen. The members of the board representing the public employer and the policemen or firemen shall be named within five days from the date of the request for the appointment of such board. If, after a period of ten days from the date of the appointment of the two arbitrators appointed by the public employer and by the policemen or firemen, the third arbitrator has not been selected by them, then either arbitrator may request the American Arbitration Association, or its successor in function, to furnish a list of three members of said association who are residents of Pennsylvania from which the third arbitrator shall be selected. The arbitrator appointed by the public employer shall eliminate one name from the list within five days after publication of the list, following which the arbitrator appointed by the policemen or firemen shall eliminate one name from the list within five days thereafter. The individual whose name remains on the list shall be the third arbitrator and shall act as chairman of the board of arbitration. The board of arbitration thus established shall commence the arbitration proceedings within ten days after the third arbitrator is selected and shall make its determination within thirty days after the appointment of the third arbitrator.

Sec. 5.—Notice by the policemen or firemen involved under section 4 shall, in the case of disputes involving the Commonwealth, be served upon the Secretary of the Commonwealth and, in the case of disputes involving political subdivisions of the Commonwealth, shall be served upon the head of the governing body of the local governmental unit involved.

Sec. 6.—Each of the arbitrators selected in accordance with section 4 hereof shall have the power to administer oaths and compel the attendance of witnesses and physical evidence by subpoena.

Sec. 7.—(a) The determination of the majority of the board of arbitration thus established shall be final on the issue or issues in dispute and shall be binding upon the public employer and the policemen or firemen involved. Such determination shall be in writing and a copy thereof shall be forwarded to both parties to the dispute. No appeal therefrom shall be allowed to any court. Such determination shall constitute a mandate to the head of the political subdivision which is the employer, or to the appropriate officer of the Commonwealth if the Commonwealth is the employer, with respect to matters which can be remedied by administrative action, and to the lawmaking body of such political subdivision or of the Commonwealth with respect to matters which require legislative action, to take the action necessary to carry out the determination of the board of arbitration.

(b) With respect to matters which require legislative action for implementation, such legislation shall be enacted, in the case of the Commonwealth, within six months following publication of the findings, and, in the case of a political subdivision of the Commonwealth, within one month following publication of the findings. The effective date of any such legislation shall be the first day of the fiscal year following the fiscal year during which the legislation is thus enacted.

Sec. 8.—The compensation, if any, of the arbitrator appointed by the policemen or firemen shall be paid by them. The compensation of the other two arbitrators, as well as all stenographic and other expenses incurred by the arbitration panel in connection with the arbitration proceedings, shall be paid by the political subdivision or by the Commonwealth, as the case may be.

Sec. 9.—The provisions of this act shall be applicable to every political subdivision of this Commonwealth notwithstanding the fact that any such political subdivision, either before or after the passage of this act, has adopted or adopts a home rule charter.

Sec. 10.—If any provision of this act or the application thereof to any person or circumstances is held invalid, the remainder of this act, and the application of such provision to other persons or circumstances, shall not be affected thereby, and to this end the provisions of this act are declared to be severable.

Sec. 11.—All acts or parts of acts inconsistent herewith are hereby repealed.

APPENDIX 4

Rules and Regulations of Labor Relations Board

Following are rules of the Pennsylvania Labor Relations Board applicable to Act 195. These are set forth in 34 Pa. Code Ch. 95.

General Provisions

Sec. 95.1 Definitions.—The following words and terms, when used in this Chapter, shall have the following meanings, unless the context clearly indicates otherwise:

Act—The Public Employee Relations of the Commonwealth (43 P.S. 1101. 201 et seq.)

Board—The Pennsylvania Labor Relations Board.

Hearing examiner—Any person duly appointed or designated by the Board to conduct a hearing.

Party—Any person, employee, group of employees, organization or public employer filing a charge, petition, request or application under these rules and regulations; any person, organization or public employer named as a party in a charge, complaint, request, application or petition filed under the act; or any person, organization or public employer whose intervention in a proceeding has been permitted or directed by the Board, secretary, or a hearing officer, but nothing herein shall be construed to prevent the Board, or any designated officer, from limiting participation by any party in the proceedings to the extent of his interest.

Petition—Any petition for investigation and certification or decertification of a collective bargaining representative filed pursuant to the act and the provisions of this Chapter.

Showing of interest—A designated percentage of public employees in an allegedly appropriate bargaining unit, or a bargaining unit determined to be appropriate, who are members of an employee organization or have designated it as their exclusive bargaining representative. or have signed a petition requesting an election for certification or decertification of public employee representatives. Such designations shall consist of written authorization cards or petitions, signed by employees and dated, authorizing an employee organization to represent such employees for the purpose of collective bargaining or requesting an election for certification or decertification of public employee representatives, current dues records, or other evidence approved by the Board.

Unfair practice—Any practice prohibited by the Public Employee Relations Act.

Institution of Representation Proceedings

Sec. 95.11. Request for certification.—(a) A public employee, employee organization, or group of employees and the public employer may, when the public employee organization represents a majority of the employees in an appropriate unit, jointly submit to the Board a request for certification upon a form to be supplied by the Board.

(b) The request for certification shall set forth the following:

(1) The name, address, telephone number of the public employer and the person to contact including his title, if known.

(2) The name, address and affiliation, if any, of the employee organization and the name, address and telephone number of its representative.

(3) A description and factual statement in support of the unit claimed to be appropriate for the purpose of exclusive representation.

(4) The budget submission date of the public employer.

(5) The signatures of the parties, including their titles and telephone numbers.

(6) A statement that the employee organization represents a majority of the employees in the unit and the method of determining such representative majority. Proof of such representative majority shall be submitted to the hearing examiner, if requested.

(7) The names and addresses of

all known employee representatives, individuals, labor organizations or groups claiming to represent any of the employees in the bargaining unit.

(8) Five days prior to the submission to the Board of the joint request for certification, the employer shall post on the bulletin boards at all locations where employees in the requested unit work, a copy of the joint request for certification and a statement that such request will be filed with the Board, 1611 Labor and Industry Building, Harrisburg, Pennsylvania 17120, for the purpose of securing from that Board a certification of ——— (Name of employee representative) ——— as the exclusive bargaining representative for the employees within such unit.

(9) A 15 percent showing of interest among employees within such requested unit is required before any employee representative may be permitted to intervene.

(10) Any other relevant facts.

Sec. 95.12. Notice of an election request.—(a) A public employee, a group of public employees, or an employee organization may submit, in writing to a public employer, upon forms prepared by the Board, a notice for an election request.

(b) A notice for an election request shall contain the following:

(1) A statement that 30 percent or more of the public employees in an appropriate unit desire to be exclusively represented for collective bargaining purposes by a designated representative.

(2) A description of the unit deemed appropriate.

(3) A request for a consent election.

Sec. 95.13. Consent to election request.—(a) If a public employer consents to an election request by public employee, a group of public employees, or an employee organization, such consent shall be given in writing to the party giving notice within 10 days of the receipt of an election request.

(b) Upon consent to an election request, a joint election request shall be submitted to the Board, in triplicate, upon forms prepared by the Board, which shall include the following:

(1) A description and factual statement in support of unit deemed appropriate.

(2) The basis for alleging a 30 percent interest or more.

(3) A list of all unit employees prepared by the employer in such order as requested by the Board with occupations or classifications of those agreed upon as eligible to vote.

(4) Suggested times and places of holding the election.

(5) The budget submission date of the public employer.

(6) Five days prior to the submission to the Board of the joint election request, the employer shall post on the bulletin boards at all locations where employees in the requested unit work, a copy of the joint election request and a statement that the request will be filed with the Board, 1611 Labor and Industry Building, Harrisburg, Pennsylvania 17120, for the purpose of securing from that Board a certification of—— (Name of employee representative)——as the exclusive bargaining representative for the employees within such unit.

(7) A 1.0 percent showing of interest among employees within such requested unit is required before any other employee representative may be placed on the ballot. A 10 percent showing of interest among employees within such requested unit is required before any other employee representative may be permitted to intervene as a party.

(8) If a public employer refuses to consent within the 10 day period to an election, the party making the request may file a petition for representation election. A public employer may file a petition for representation election if after receiving a notice for an election request the moving party thereafter fails to submit a joint election request within 10 days after consent is given by such employer.

Sec. 95.14. Contents of elections re-

quest.—A petition for representation election shall, when filed by a public employee, employee organization, a group of public employees, or public employer, contain the following:

(1) The name, address, telephone number of the public employer, and the person to contact including his title, if known.

(2) The name and affiliation, if any, of the petitioner and its address and telephone number.

(3) A description and factual statement in support of the unit claimed to be appropriate for the purpose of exclusive representation by the petitioner. Such description shall indicate the general classifications of employees to be included and those to be excluded and the approximate number of employees in such unit.

(4) The date of the giving of the notice for election request and date it was accepted or declined by the public employer or a statement that no reply has been received.

(5) The name, address and telephone number of the recognized or certified exclusive representative, if any, and the date of such certification or recognition and the expiration date of any applicable contract, if known to the petitioner.

(6) The budget submission date of the employer.

(7) The signature of the representative of petitioner, including his title and telephone number.

(8) A statement, if appropriate, of the showing of interest of not less than 30 per cent of the employees, in such unit and the method of ascertaining such showing of interest. Proof of this statement shall be submitted to the hearing examiner, if requested.

(9) The names, addresses and telephone numbers of all known representatives, individuals, labor organizations or groups claiming to represent any of the employees in the bargaining unit.

(10) A 1.0 per cent showing of interest among employees within such requested unit is required before any other employee representative may be placed on the ballot. A 10 per cent showing of interest among employees within such requested unit is required before any other employee representative may be permitted to intervene as a party.

(11) Any other relevant facts.

Sec. 95.15. Disclaimer of interest.—In the event any employee organization shall, at any point prior to the issuance of an order for election, file a disclaimer of interest with the Board, the Board may either dismiss the petition for election or drop the name of such employee organization from the ballot, if the conduct of the employee organization is consistent with such disclaimer.

Sec. 95.16. Employees' names and addresses.—Following the determination, by the Board, of the appropriate unit as required by Article VI of the Act (43 P. S. Secs. 1101.601 to 1101.607), the Board, or its duly authorized agent, will have the right to direct the employer to submit forthwith to the Board a list of names and addresses of the employees in the appropriate unit, such list to be made available by the Board to any party to the proceeding who requests it.

Sec. 95.17. Validity of showing of interest.—The showing of interest submitted will not be furnished to any of the parties. The Board or its agents will determine the adequacy of the showing of interest and such decision shall not be subject to collateral attack in any hearing.

Sec. 95.21. Petition by employees.—A petition by a public employee, or a group of public employees, for decertification of public employee representative shall be filed with the Board not sooner than 90 days nor later than 60 days before the expiration date of any collective bargaining agreement; or after the expiration date until such time as a new written agreement has been entered into; or, if no collective bargaining agreement has been entered into, not sooner than one year from the date the certification had become effective. Said petition shall be on the form supplied by the Board and shall contain the following:

(1) A statement alleging that the employee representative certified by the Board, or currently recognized by the public employer, no longer represents a majority of the employees in the collective bargaining unit in which it is currently recognized or certified.

(2) A statement of the showing of interest of not less than 30 percent of the employees in the unit and the method of ascertaining such showing of interest. Proof of this statement shall be submitted to the hearing examiner, upon request. A showing of interest shall indicate that the employees no longer desire to be represented for the purpose of collective bargaining by the currently recognized or certified employee representative.

(3) The name and address of the employer.

(4) The name and address of the petitioner.

(5) The name and address of the incumbent representative.

(6) The date of expiration of the contract.

(7) The number of employees in the unit.

(8) The date of the last election.

(9) Any other relevant facts.

Sec. 95.22. Petitition by employers.—A petition by a public employer for decertification of a public employee representative shall be filed with the Board not sooner than 90 days nor later than 60 days before the expiration date of any collective bargaining agreement; or after the expiration date until such time as a new written agreement has been entered into; or, if no collective bargaining agreement has been entered into, not sooner than one year from the date the certification had become effective. Such petition shall be on the form supplied by the Board and shall contain the following:

(1) A factual statement indicating a good faith doubt of the majority status of the public employee representative.

(2) The name of the currently recognized or certified public employee representative.

(3) The name and address of the employer and a description of the bargaining unit involved.

(4) The general nature of the business of the employer.

(5) The name and address of the incumbent representative.

(6) The date of expiration of the contract.

(7) The number of employees in the unit.

(8) The date of the last election

(9) Any other relevant facts.

Sec. 95.23. Unit clarifications.—(a) If no question of representation exists, a petition for clarification of an existing bargaining unit or a petition for amendment of certification may be filed by the collective bargaining representative or by the public employer.

(b) A petition for unit clarification shall contain the following:

(1) The name of the employer and the name of the collective bargaining representative.

(2) The address of the employer.

(3) A description of the present bargaining unit and, if the bargaining unit is certified, an identification of the existing certification.

(4) A description of the proposed clarification.

(5) The names and addresses of any other person or employee organizations who claim to represent any employees affected by the proposed clarifications, and brief descriptions of the contracts, if any, covering any such employees.

(6) The number of employees in the present bargaining unit and in the unit as proposed under the clarification.

(7) The job classifications of employees as to whom the issue is raised, and the number of employees in each classification.

(8) A statement by petitioner setting forth the reasons for requesting the clarification.

(9) The name, affiliation, if any, and addresses of the petitioner.

(10) Any other relevant facts.

(c) A petition for amendment of certification shall contain the following:

(1) The name of the employer and the name of the certified employee organization involved.

(2) The address of the employer involved.

(3) Identification and description of the existing certification.

(4) A statement by petitioner setting forth the details of the desired amendment and reasons therefor.

(5) The names and addresses of any other person or employee organization claiming to represent any employees in the unit covered by the certification and brief description of the contracts, if any, covering the employees in such unit.

(6) The name, affiliation, if any, and address of the petitioner.

(7) A brief description of the process utilized in carrying out the affiliation.

(8) Any other relevant facts.

Unfair Practices Proceedings

Sec. 95.31. Charges—(a) All charges shall be in writing on forms supplied by the Board and shall be signed and sworn to before any person authorized to administer oaths. An original and three copies of the charge shall be filed with the Board by one or more public employees, or any employee organization, acting in their behalf, or by a public employer.

(b) The charge shall include the following information:

(1) The name, address, telephone, number and affiliation, if any, of the charging party, and the title of any representative filing the charge.

(2) The name, address and telephone number of the respondent, or respondents, and any other party named in the charge.

(3) A clear and concise statement of the facts constituting the alleged unfair practice, including the names of the individuals involved in the alleged unfair practice, the time, place of occurrance and nature of each particular act alleged, and reference to the specific provisions of the act alleged to have been violated.

(c) After a charge has been filed, if it appears to the Board that formal proceedings in respect to the charge should be instituted, the Board, or any member of the Board or the regional director, may issue and cause to be served upon the parties a complaint in the name of the Board, stating the alleged unfair practices, and containing a notice of hearing before a hearing examiner at a place stated in the complaint and at a time not less than five days after the service of the complaint unless involving charges un-Secs. 803 or 1201(b)(6) or (7) of the act (43 P. S. Secs. 1101.803 or 1101. 1202(b)(6) or (7)).

Sec. 95.32. Amendment of complaints and answers.—(a) At the discretion of the Board, upon due notice to all parties, any complaint may be amended, in such manner as the Board may deem just and proper, at any time before the issuance of a final decision and order, if no new cause of action is added after the statute of limitations has run.

(b) Any complaint, amended complaint, or any part thereof, may be dismissed by the Board on its own motion or any charge may, with the approval of the Board, be withdrawn upon the motion of the complainant at any time before the issuance of a final decision and order, upon due notice to all parties.

(c) Subject to the approval of the hearing examiner or the Board, an answer may be amended upon motion of the party filing it at any time before the commencement of the testimony. Such motion shall be in writing unless made at the hearing and before commencement of the testimony. A copy of such motion shall be served upon all parties. In the event the complainant is prejudiced by the amendment, a motion for continuance will be granted.

Sec. 95.33. Prosecuting authority.—All cases in which complaints are actually issued by the Board shall be prosecuted before the Board, any member of the Board, or its hearing examiner, by the representative of the employee organization or party filing the charge, and, in addition to the charge, or in lieu of it, if the Department of Justice sees fit, by a Deputy Attorney General, especially assigned to this type of case.

Sec. 95.34. Answers.—(a) The Board recognizes that the primary purpose of pleadings is the formation of issues. Consequently, all rules pertaining to pleadings will be liberally construed toward effecting that end.

(b) No answer need be filed in representation cases.

(c) The respondent shall, except in charges provided for in Secs. 803 or 1201(b)(6) or (7) of the Act (43 P.S. Sec. 1101. 803 or Sec. 1101.1201(b)(6) or (7)) file an answer to the original or amended complaint within 15 days from the service of the complaint. Answers shall be verified by the person filing them, and shall be filed with the Board at Harrisburg or at its regional offices. Copies of all answers shall be served upon all parties to the proceeding. Proof of service of the answer shall be filed with the Board. A party who fails to file an answer or to specifically deny allegations in the complaint shall be deemed to admit only those averments relating to the identity of the parties; all other averments shall be deemed to be denied.

(d) In the discretion of the Hearing Examiner at the hearing, or in the discretion of the Board, an answer may be amended upon motion of the party filing it, upon due notice to all parties, at any time before the issuance of the final decision and order. Such motion must be in writing unless made during the conduct of the hearing.

Sec. 95.35. New matter in the answer.—(a) All affirmative defenses, including but not limited to the jurisdiction of the Board and statute of limitations, shall be pleaded under the heading of new matter in the answer.

(b) Allegations of new matter in the answer shall be deemed denied without the necessity of a reply.

Sec. 95.36. Offers of fact and proposals.—At any stage of a proceeding, prior to a hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity to submit to the Board, or any member or agent of the Board, for consideration facts, arguments, offers of settlement, or proposals of adjustment.

Sec. 95.37. Dismissal.—All petitions and charges shall set forth fully and specifically all the information and facts required by the act, the rules and the forms supplied by the Board. The Board may, upon any failure to comply with this section, dismiss the petition or charge without any further proceedings.

Prehearing Provisions

Sec. 95.41. Service of papers.—Service of papers by a pary on other parties shall be made personally, by United States mail, by telegram, or by leaving a copy of such papers with the person then in charge at the principal office or place of business of the person to be served. Where any attorney or representative has entered his appearance pursuant to Sec. 91.2(a) of this Title (relating to appearances), all complaints, orders and other processes and papers shall be served on such attorney or representative and need not be served on the party.

Sec. 95.42. Filing of papers.—(a) When the act, any of the provisions of this Chapter or any order of the Board requires the filing of a motion, brief, exception, or other paper in any proceeding, such document shall be received by the Board or the officer or agent designated by the Board to receive such document before the close of business of the last day of the time limit, if any, for such filing. Any exceptions to this requirement will be at the discretion of the Board.

(b) Charges and petitions may be filed with the principal office of the Board in Harrisburg, or with the regional office of the Board in Philadelphia or Pittsburgh. Charge and petition forms are available at all Board offices.

(c) In all actions before the Board, the first paper filed on behalf of each party shall contain an address including zip code at which service of complaints, orders and other processes and papers of the Board may be made. Thereafter, any party may file with the Board a correction which shall form part of the record in the case, setting forth a new address with zip code at which such service may be made. If he does not do so, notice sent to him by United States mail at his last address of record shall be equivalent to service.

(d) All papers, pleadings, briefs, or other documents filed with the Board shall be legibly typed, printed or otherwise legibly duplicated.

(e) An original and three copies of all papers, pleadings, briefs, or other documents to be filed with the Board shall be submitted to the Board, unless otherwise specified.

Sec. 95.43 Notice.—(a) The Board will give notice of election at least 10 calendar days before the date of such election. The notice will include a description of the bargaining unit, the form of the ballot, the times and places where the election is to be held, and a list of names of those eligible to vote or reference to the places where such list shall be filed and available for inspection:

(b) Notices may be posted by the Board officer or the Board may direct the employer to post such notices and orders and make a return of such posting.

(c) All notices shall be posted at the place of business of the employer at all locations where employees in the requested unit work. The Board may post or order the public employer to post such other orders and notices as it may deem necessary or appropriate.

Sec. 95.44. Interventions.—(a) Motions to intervene shall be in writing, specify the grounds for intervention, be signed and verified, and a copy shall be served upon all parties to the proceedings. Proof for motions to intervene shall be filed with the Board.

(b) In representation proceedings, the hearing examiner may, subject to Sec. 95.11 of this Title (relating to request for certification) permit public employers, public employees and employee organizations to participate as parties without formal intervention, upon a showing of good cause which reasonably prevented them from having filed a timely motion to intervene.

(c) The Board or any member of the Board, or the hearing examiner, as the case may be, may, by orders, permit intervention in person, by counsel, or by other representative to such extent and upon such terms as they may deem proper.

Sec. 95.45. Continuances.—(a) All motions for a continuance made prior to a hearing shall be in writing, shall be filed with the Board at Harrisburg, and shall set forth the reasons for a continuance and the position of all parties or their representatives to the request. No such motion shall be acted upon by the Board unless it is filed at least 72 hours prior to the hearing, and the ruling of the Board shall be final. Upon good cause shown, the 72 hour provision or the necessity of a written motion may be waived at the discretion of the Board.

(b) Conflicting engagements of counsel, whether before a court of record or an administrative tribunal, shall normally not constitute sufficient grounds for a continuance of any proceeding before the Board, unless the date for the appearance of counsel in the conflicting engagement was fixed before receipt of notice of the proceeding before the Board.

(c) Agreement of counsel shall not of itself be sufficient cause for the granting of a continuance.

(d) At any hearing, the hearing examiner subject to the approval of the Board, may continue the hearing from day to day, or to adjourn it to a later date or a different place, by announcement of such change at the hearing or by other appropriate notice.

Sec. 95.46. Prehearing conferences.—In representation, decertification and unfair practice proceedings the Board, on its own motion or upon the written request of either party, may designate a member or hearing examiner to meet with the parties at a time mutually convenient to all, to conduct a prehearing conference for the purpose of delineating the issues and, to the extent possible, agree on such facts, matters, or procedures as will facilitate and expedite the hearings, elections, or adjudication of the issues.

Elections

Sec. 95.51. Ballots.—(a) All elections shall be by secret ballot, at times, places and in such manner as the Board may direct, and shall be conducted by a designated agent of the Board, whose determination of all questions arising shall be final, subject, however, to review by the Board.

(b) Ballots shall be prepared and issued by the Board. Ballots shall contain the name of each representative and a choice of "no representative." The place of priority on the ballot shall be determined by the chronological filing or appearance on the dockets of the Board but with the petitioner taking first priority. In a runoff election, the place of priority shall be determined by the sequence appearing on the ballot at the prior inconclusive election.

Sec. 95.52. Election watchers.—Each party to the election shall be entitled to be represented by one watcher at each polling place or by such additional watchers as the parties may agree, subject to such limitations as the Board or its duly authorized agent may prescribe. Watchers for all parties shall be employees eligible to vote. However, in the event the employer is unable to find an individual on the list of eligible voters who is willing to serve as a watcher, he may choose a non-supervisory or other appropriate person.

Sec. 95.53. Polling area.—Prior to the commencement of the election the agent of the Board shall designate the polling area and no electioneering of any kind shall take place within this area. Any violation of this requirement by any party or its representative or agent may be ground for setting aside the election.

Sec. 95.54. Voter eligibility.—All employees whose names appear upon the list certified by the Board as being a complete list of the employees within the defined appropriate unit shall be eligible to vote.

Sec. 95.55. Challenged voters.—(a) Any prospective voter may be challenged for cause.

(b) All employees whose names do not appear upon the list certified by the Board as being a complete list of the employees within the defined appropriate unit shall be challenged by the agent of the Board.

(c) A challenged voter shall vote but his ballot shall not be cast. It shall instead be sealed in a separate, unmarked envelope under the supervision of the agent of the Board and then inserted in a special indentifiable form envelope provided by the Board for that purpose and returned to the Board.

Sec. 95.56. Election results.—(a) In all elections a majority of the valid votes case shall determine the employee representative designated or selected by the employees in the defined appropriate unit or the determination that no representative has been designated.

(b) The Board will conduct runoff elections expeditiously.

(c) Each party to the election shall be permitted to observe the canvass of the ballots.

Sec. 95.57. Challenges and exceptions.—All objections to the conduct of a party to the election or exceptions to the Board's conduct of an election shall be filed within five work ing days of the holding of the election and of the initial canvass of the ballots.

Collective Bargaining Impasse

Sec. 95.61. Fact finding panels.—(a) In the event the bureau of mediation notifies the Board of the failure of the parties to have reached an agreement within the time provided by the act, the Board may, in its discretion, appoint a fact-finding panel consisting of either one or three members.

(b) Immediately following such appointment the Board shall notify the panel member or members and all parties of the appointment, requesting the panel to proceed with the holding of hearings in accordance with the terms and conditions of the act, giving due notice of the time and place of the same in writing to all parties.

Sec. 95.62. Filing of issues.—Within five days of receipt of notice from the panel that the parties failed to reach an agreement the parties shall file with the panel written statements of the issues in dispute and their contentions with respect to their dispute. A copy of such statements shall be served upon the other parties. The matters to be considered by the panel shall be limited to those set forth in such statements.

Sec. 95.63. Hearings.—(a) The hearings before the panel shall be private and all witnesses to be heard shall be either sworn or affirmed. While the panel need not insist upon adherence to the legal rules of evidence, it shall, however, base its findings of fact and recommendations upon reliable and credible evidence produced at the hearings.

(b) The panel may grant such continuances as the circumstances require, having in mind the exigencies of the period requirements of the act.

(c) The panel shall issue its findings of fact and recommendations in writing to the parties and thereafter make them public in accordance with the provisions of the act.

Sec. 95.64. Fact finding and arbitration compensation.—In furtherance of the provisions of Secs. 802, 805, 806 and 807 of the act (42 P. S. Secs. 1101.802, 1101.805, 1101.806, 1101. 807), the Board shall maintain a list of candidates available for service on the panels to be appointed. Prior to the appointment, Fact Finders and Arbitrators shall have filed with the Board a resume of their qualifications and requested fees for services to be rendered. All services provided by such Fact Finders and Arbitrators shall be compensated in accordance with a schedule of rates approved by the Board.

Sec. 95.66. Impasses involving guards at prisons and mental institutions.—All impasses involving units of guards at prisons or mental hospitals or units of employees directly involved with the functioning of courts of this Commonwealth, unresolved by the intervention of mediation, shall be submitted to arbitration pursuant to Sec. 805 of the act (43 P.S. Sec. 1101.805). The Bureau of Mediation shall notify the Board of such impasse and the need for invoking such arbitration.

Sec. 95.67. Arbitration costs.—(a) The impartial arbitrator chosen pursuant to Sec. 806(1) or (2) of the Act (43 P. S. Secs. 1101.806(a) or (2)) shall notify the Board of his selection or appointment prior to assuming his duties as third member and chairman.

(b) Third member arbitrators

chosen pursuant to Secs. 806(1) or (2) of the act (43 P. S. Sec. 1101.806(1) or (2)) shall be compensated by the Board (see act of May 20, 1976 (No. 67) (43 P. S. Sec. 1101.806(a)). Within 30 days of completion of the arbitration process, the third member arbitrator shall submit to the Board a detailed statement of costs, based on the rate of $20 per hour plus expenses, setting forth the dates and time spent in research, hearing and preparation of the report.

Collective Bargaining Contracts

Sec. 95.71. Collective bargaining contracts.—Copies of all collective bargaining contracts entered into between a public employer and a duly certified employee representative following the issuance of a certification shall be filed with the Board within a period of 30 days after the date of the execution of the collective bargaining contracts.

Authority of Secretary and Executive Director

Sec. 95.81. Authority of secretary and executive director.—(a) The secretary of the Board or the Executive Director shall have authority to issue notices or orders of the Board and to certify copies of all papers and documents which are part of any of the files or records of the Board.

(b) The secretary of the Board or the Executive Director shall have authority to issue orders directing and fixing time and place of initial hearings in representation cases.

(c) The secretary or the Executive Director shall have authority to issue complaints in unfair practice cases.

(d) The secretary or the Executive Director shall, prior to the holding of a formal hearing, have authority to grant continuances for cause, subject to the provisions of Sec. 93.17 of this Title (relating to continuances).

Provisions for Formal Proceedings

Sec. 95.91. Hearings.—(a) Hearings before a hearing examiner shall be subject generally to the provisions of Sec. 93.31 of this Title (relating to hearings).

(b) The transcript of the testimony in all hearings shall become part of the record if no objections to such transcript are filed with the Board within 15 days after its deposit in the United States mail. The postmark shall be conclusive evidence of the date of mailing. Objections shall specify the matter objected to and the relief sought. The Board may, in its discretion, order a hearing on the objections. The Board shall make such order as may be necessary to conform the transcript to the occurrences at the hearing and the conformed transcript shall then be duly certified by the official stenographer, shall be filed of record in the case, and shall be treated as official and part of such record for purposes of review upon appeal, and shall be considered as prima facie accurate whenever thereafter offered in evidence.

(c) Motions made during a hearing and objections with respect to the conduct of a hearing, including objections to the introduction of evidence, shall be stated orally and shall be included in the stenographic report of the hearing. Final argument shall not be included in the stenographic report unless the hearing examiner shall so direct.

Sec. 95.92. Contemptuous conduct.—The provisions of Sec. 93.32 of this Title (relating to contemptuous conduct) shall govern proceedings before a hearing examiner.

Sec. 95.93. Briefs, requests for findings of fact, and conclusions.—Briefs and requests findings of fact or conclusions may be filed with the Board within 10 days after the receipt of the transcript of the testimony by the Board. Copies of any briefs or requests so submitted shall be served upon all parties to the proceeding and proof thereof filed with the Board. Extensions of time may, upon request, be permitted by the Board.

Sec. 95.94. Depositions.—(a) Witnesses at all hearings shall be examined orally under oath or affirmation, and a record of the proceeding shall be made and kept by the Board. If any witness resides outside the Commonwealth or through illness or other cause is unable to testify before the Board, its members, or hearing examiner conducting the hearing or investigation, his testimony may, upon application, be taken by deposition.

(b) Applications to take depositions under this section shall be in writing or may be made orally at a hearing. The application shall set forth the reasons why such depositions should be taken, the name and post office address with zip code of the witness, and the time and place proposed for the taking of the deposition. The Board, any of its members or hearing examiner, as the case may be, may, upon such application, issue an order allowing the taking of the deposition. Such order shall be served on all of the parties. Such deposition may be taken before any officer authorized to administer oaths by the laws of the Commonwealth or of the United States or of the place where the examination is held, including any agent of the Board authorized to administer oaths.

(c) During such depositions all objections to questions or evidence shall be deemed waived unless made at the examination of the witness. The officer shall not rule upon any objections but he shall note them on the deposition. The testimony shall be subscribed by the witness in the presence of the officer who shall attach his certificate stating that the witness was duly sworn or affirmed by him, that the deposition is a true record of the testimony and exhibits given by the witness, and that such officer is not of counsel or attorney to any of the parties nor interested in the outcome of the proceeding or investigation. If the deposition is not signed by the witness because he is ill, dead, cannot be found, or refuses to sign it, such fact shall be included in the certificate of the officer and the deposition may then be used as fully as though signed. The officer shall immediately deliver an original and a copy of such transcript, together with his certificate, in person or by United States mail to the Board, its members, or hearing examiner, as the case may be. The hearing examiner shall rule upon the admissibility of the deposition or any part of such deposition.

(d) All errors or irregularities in compliance with the provisions of this section shall be deemed waived unless a motion to suppress the deposition or some part of it is made with reasonable promptness after such defect is ascertained, or, with due diligence, might have been ascertained.

Sec. 95.95. Witnesses and subpoenas.—Witness and mileage fees shall be paid by the party at whose instance the witnesses are called, which fees shall be the same as those paid in the courts of this Commonwealth. Subpoenas shall be issued and enforced in accordance with the act.

Sec. 95.96. Orders.—(a) The provisions of Sec. 93.35 of this Title (relating to orders) shall govern orders.

(b) No exceptions may be filed to Final Orders, Orders Directing Elections, or purely procedural Orders of the Board.

(c) When an election has been held, the Board will issue a decision and order stating its findings on the conduct and results of the election, and shall certify the representative that has been selected and designated or certify the results of the election, as the facts of the case may warrant.

Sec. 95.97. Motions for withdrawal.—(a) Motions for withdrawal of charges or petitions made before or after hearing and based upon settlements between employers, employees, or their respective representatives, will not be considered unless filed with the Board in writing, and, if requested by the Board, the reasons for withdrawal shall be stated.

(b) Motions for withdrawal of charges or petitions may be made orally during the progress of a hearing. The reasons for withdrawal if requested by the hearing examiner, shall be stated on the record. The decision on such motions will be reserved for the Board.

(c) No charge or petition may be withdrawn at any time without the consent of the Board.

Sec. 95.98. Exceptions.—(a) Exceptions to nisi orders of the Board shall be in writing, separately stated and numbered, and shall specify with particularity the error of which complaint is made. The original shall be filed with the Board, a copy of the exceptions shall be served upon all parties to the prooeeding and proof of service shall be filed with the Board.

(b) The Board may order an oral argument to be heard before it at a time and place to be set forth in such order.

(c) Any party filing exceptions may, on or before the date set for argument, file three copies of a written brief with the Board in support of such exceptions, and a copy thereof shall be served upon all parties to the proceeding. On or before the date set for argument other parties may file briefs if they so desire.

(d) Exceptions which are not advanced shall be deemed to have been waived unless the Board permits the submission of exceptions at oral argument.

Sec. 95.99. Reopening of hearing.—(a) Motions for leave to reopen a hearing because of newly discovered evidence shall be timely made.

(b) The Board may, in its discretion and upon its own motion, reopen a hearing and take further testimony at any time.

Sec. 95.100. Computation of time.—(a) When any period of time is referred to in the Act or in any rule, such period in all cases shall be so computed as to exclude the first and include the last day of such period.

(b) Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.

Sec. 95.101. Political contributions.—(a) An employee organization which has made contributions out of funds of the employee organization either directly or indirectly to any political party or organization or in support of any political candidate for public office shall file a report with the Board which shall contain the following:

(1) A statement describing the date(s), place(s) of occurrence, amount(s), and beneficiary(ies) of such contribution(s).

(2) The signatures of the president and treasurer or corresponding principals of the employee organization.

Sec. 95.102. Illegal contributions.—(a) Any individual who has knowledge of a political contribution or other activity by an employee organization thought to be in violation of Sec. 1701 may file a report with the Board. The report shall be signed and sworn to before any person authorized to administer oaths.

(b) The report shall contain the following information:

(1) The name, address, telephone number and affiliation, if any, of the charging party.

(2) A clear and concise statement of the facts constituting the alleged illegal contribution, including the names of individuals involved, the name of the employee organization, and the time, place of occurrence and nature of each particular contribution or act alleged.

(c) Upon receipt of such report, if it appears to the Board that an investigation in respect to the charge should be instituted, the Board shall refer such report to the Attorney General of the Commonwealth of Pennsylvania for proceedings under applicable statutes.

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